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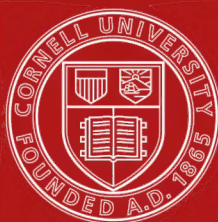
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**The principles of the law of evidence; wi**



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THE  
PRINCIPLES  
OF THE  
LAW OF EVIDENCE;  
WITH  
ELEMENTARY RULES  
FOR CONDUCTING  
THE EXAMINATION AND CROSS-EXAMINATION  
OF  
WITNESSES.

*William Awdesley*  
By W. M. BEST, A.M., LL.B.,  
OF GRAY'S INN, ESQ., BARRISTER AT LAW.

---

"Principiis, Causis, et Elementis ignoratis, Scientia de quâ ipsa sunt, penitus ignoratur."  
*Fortescue de Laud. Leg. Angl. c. 8.*

---

IN TWO VOLUMES.

VOL. I.

FIRST AMERICAN, FROM THE FIFTH LONDON, EDITION.

WITH NOTES AND REFERENCES TO AMERICAN CASES

By H. G. WOOD,  
COUNSELOR AT LAW.

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ALBANY, N. Y.  
WEARE C. LITTLE & CO., PUBLISHERS.  
1875.

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## ADVERTISEMENT

TO THE FIFTH EDITION.

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SHORTLY after the death of Mr. Best I undertook to prepare for the Press that portion of the present edition of this Work which he had left unfinished.

The last proof-sheet corrected by my friend was that ending at page 128. But he had carefully noted up the whole Book. So that, in revising the remaining sheets, I have had the benefit of many suggestions which he had made for his own guidance; as well as the use of all the materials which he had collected, with a view to the preparation of this edition.

To these I have added some cases which appeared to have escaped the notice of my friend, and a few which have been decided since his death; and I trust that, in the result, the Book, in its present state, will be found to contain an accurate exposition of that branch of our law of which it treats, as settled by the most recent decisions.

JOHN A. RUSSELL.

TEMPLE, *Trinity Term*, 1870.





## ORIGINAL PREFACE.

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THE common-law system of evidence, in its actual state the growth of the last two centuries, must ever claim the highest respect and admiration as a whole, however particular portions of it may be justly or unjustly condemned. Now the design of the present work is not to add to the *practical* treatises by which the subject has been illustrated, but to examine the *principles* on which its rules are founded, tracing them to their sources, and showing their connection with each other. To this are annexed a sketch of the practice relative to the offering and receiving evidence at trials, and a few elementary precepts, founded chiefly on those of Quintilian, for the guidance of young practitioners in interrogating witnesses.

Throughout the book, particularly in the Introduction, when treating of judicial evidence in the abstract, much assistance has been derived from the Roman law, the civilians, and other foreign writers; and especially from the able work published by M. Bonnier, at Paris, in 1843, entitled "Traité Théorique et Pratique des Preuves en Droit Civil et en Droit Criminel." Large use has also been made of "Bentham's Rationale of Judicial Evidence," in five volumes, London, 1827, in which the general principles of evidence are ably discussed, and often happily illustrated. That book should, however, be read with caution, as it embodies several essential mistaken views

relative to the nature of *judicial* evidence, and which may be traced to overlooking the characteristic features whereby it is distinguished from other kinds of evidence. Some of these errors will be pointed out in the Introduction.

The Author begs to express his grateful acknowledgments for suggestions from many friends. The Index has been compiled by Mr. H. Macnamara, of the Inner Temple.

CHANCERY LANE, *July*, 1849.

## PREFACE TO THE AMERICAN EDITION.

---

MR. BEST's work on Evidence has met with great favor in the courts of this country, and is regarded as good authority upon any question to which it relates.

I have not attempted to annotate the work in the usual way, by citing supporting authorities to sustain each proposition, but have deemed it more advisable to make the notes cover particular topics, and those that are of the most practical value to lawyers and which generally perplex them most.

Trusting that the work will be found to fill a *niche* in the law of evidence which will render it of value to the profession, I submit it to their criticism.

H. G. WOOD.

ALBANY, N. Y., Nov. 12, 1875.



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THE  
PRINCIPLES OF EVIDENCE,

&c., &c.

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INTRODUCTION.

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*Connection between law and facts.*

SECTION 1. Law has been correctly defined a rule of human action, prescribed and promulgated by sovereign authority, and enforced by sanction of reward or punishment. But although human actions are the subject-matter about which law is conversant, they are not essential to its existence; for the rule is the same whether its application is called forth or not. "If you commit murder or steal, you shall be punished;" "if you buy a man's land or goods, you shall pay for them;" would hold true as rules of law though no murder or theft were ever committed, and though every debt contracted were faithfully discharged. The rule continues in abstraction and theory until an act is done on which it can attach, and assume, as it were, a body and shape. The maxim of jurists and lawyers, "*ex facto oritur jus*" (Law arises out of fact, *or*, is brought into exercise by fact), and

<sup>1</sup> 3 Blackst. Com. 329; 2 Inst. 49.

such like, must be understood in this sense; and the duty of judicial tribunals consequently embraces the investigation of doubtful or disputed facts, as well as the application of the principles of jurisprudence to such as are ascertained.

*Investigation of facts by judicial tribunals.*

§ 2. Facts which come in question in courts of justice are inquired into and determined in precisely the same way as doubtful or disputed facts are inquired into and determined by mankind in general, except so far as positive law has interposed with artificial rules to secure impartiality and accuracy of decision, or exclude collateral mischiefs likely to result from the investigation. And this is strictly analogous to the relation between natural and municipal law, of which it has been well observed, "There are in nature certain fountains of justice, whence all civil laws are derived but as streams: and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountains."<sup>1</sup> As therefore the study of natural law precedes that of municipal, so an inquiry into the natural resources of the human mind for the investigation of truth should precede an examination of the artificial means devised for its assistance: and the present Introduction will accordingly consist of two Parts, devoted to these respective subjects.

<sup>1</sup> Bacon on the Advancement of Learning, Book 2.

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### *Human understanding.*

§ 3. The human understanding may be considered in three points of view, namely:—With respect to the sources of our ideas; the objects about which the human mind is conversant; and the intensity of our persuasions as to the truth or falsehood of facts or propositions.

#### 1. *Sources of ideas* — 1. *Sensation, internal sense, external sense* — 2. *Reflection.*

§ 4. The best metaphysicians trace all our ideas to the sources of sensation or of reflection.<sup>1</sup> There

<sup>1</sup> Locke on the Human Understanding, bk. 2, ch. 1, and passim. The classification of ideas into those of sensation and reflection, as the terms are here explained, includes those ideas which modern authors attribute to faculties they call "consciousness, spontaneity, &c." The truth of this part of Locke's ideal theory, when thus understood, seems admitted even by Stewart, Reid and Cousin, who have so severely attacked it in other respects (see Stewart's Philosophical Essays, Essay 1, ch. 2, pp. 85, 86, 3rd Ed.; Stewart's Philosophy of the Human Mind, vol. 1, ch. 1, sect. 4, 6th Ed.; Reid on the Powers of the Human Mind, vol. 1, Essay 3, ch. 5; Cousin,



\*appear to be two kinds of sensation: 1. The internal sense—the intuitive perception of our own [\*5] existence and of what is actually passing in our minds. Of all forms of knowledge or persuasion this is the clearest and most indubitable; and is indeed the basis of every other. Descartes and Locke, however different their systems in other respects, agree in this. “Ego cogito, ergo sum” is the celebrated maxim of the former:² “If I doubt of all other things,” says the latter,³ “that very doubt makes me perceive my own existence, and will not suffer me to doubt of that.” “The sceptics,” observes Sir Thomas Brown,⁴ “that affirmed they knew nothing, even in that opinion confute themselves, and thought they knew more than all the world besides.” And according to a scholastic maxim, “*Nihil est in intellectu, quod non fuerit, in sensu*,”⁵ to which Leibnitz sagaciously adds “*nisi ipse intellectus*.”⁶ 2. The external sense—the faculty whereby the perception of the presence of external objects is conveyed to the mind through our outward senses.⁷ All our other ideas are formed from the above by the opera-

Cours de l'Histoire de la Philosophie, &c., vol. 2, pp. 131 and 389); and, notwithstanding some passages in his Essay, it may be a question whether such were not the meaning of Locke himself. In citing that eminent metaphysician, we do not hold ourselves accountable for *all* his views or language, far less for every consequence that may be deduced from them.

¹ Bonnier, *Traité des Preuves*, §§ 6 and 7, 2nd Ed. Locke in loc. cit. § 4, uses “internal sense” to signify “reflection.”

² *Principia Philosophiæ*, pars. 1, n. 7.

³ Locke on the Human Understanding, bk. 4, ch. 9, § 3.

⁴ *Religio Medici*, sect. 55. “Que penser d’un juge qui méconnaîtrait sa propre existence? Mais une pareille supposition est inadmissible. La chicane la plus audacieuse n’oserait soulever de pareils doutes. L’évidence interne est la base de toute certitude judiciaire, comme de toute certitude en général; mais c’est une base incontestée et incontestable.” Bonnier, *Traité des Preuves*, § 19, 2nd Ed.

⁵ *Encyclop. Britan.* 1st Dissertation, pp. 113, 114.

⁶ See his works, vol. 5, p. 359, Genev. 1768.

⁷ Locke, bk. 2, ch. 1; Bonnier, *Traité des Preuves*, § 8, 2nd Ed.

[\*6] tions \*of "reflection;" which may be defined, that faculty through which the mind is supplied with ideas by any sort of act or operation of its own, either on ideas received directly through the senses, or on other ideas, either immediately or mediately traceable to ideas so received.

*Objects about which the mind is conversant* — 1. *Relations between ideas* — 2. *Real existences*.

§ 5. The human mind is conversant about two classes of objects.<sup>1</sup> 1. The relations between its ideas.<sup>2</sup> Under this head come mathematical and such live truths; where it is obvious that the relations of our ideas to each other may be true although there be nothing without the mind corresponding to the ideas within it. The properties of an equilateral triangle or circle, for instance, are equally indisputable whether a perfect equilateral triangle or perfect circle can be found in the universe or not;<sup>3</sup> and astronomers investigate the curves bodies would describe if acted on by forces which, so far as we are aware, have no patterns in nature.<sup>4</sup> 2. Real existences: *i. e.* objects

<sup>1</sup> Locke, bk. 2, ch. 1.

<sup>2</sup> Id. bk. 4, ch. 1.

<sup>3</sup> Id. bk. 4, ch. 1, §§ 4, 5, 6.

<sup>4</sup> Id. bk. 4, ch. 4, § 6; De Morgan on Probabilities, p. 9.

<sup>5</sup> It must not however be supposed that mathematical truths have not, like all others, their ultimate basis in experience. As the highest authority we subjoin the following from Sir Isaac Newton's Preface to his immortal work, "*Philosophiæ Naturalis Principia Mathematica*." "*Linearum rectarum et circulorum descriptiones, in quibus Geometriæ fundatur, ad Mechanicam pertinent. Has lineas describere geometriæ non docet, sed postulat. Postulat enim ut tiro easdem accuratè describere priùs didicerit, quàm limen attingat geometriæ; dein, quomodo per has operationes problemata solvantur, docet: rectas et circulos describere problemata sunt, sed non geometrica. Ex mechanicâ postulatur horum solutio, in gemetriâ docetur solutorum usus. Ac gloriatur geometria quòd tam paucis principiis aliundè petitis tam multa præstet. Fundatur igitur geometria in praxi mechanicâ.*"

existing without the mind corresponding to ideas within it.<sup>1</sup>

*Intensity of Persuasion — Knowledge — Certainty.*

\* § 6. With regard to intensity of persuasion, the faculties of the human mind are comprehended [<sup>\*7</sup>] in the genera, knowledge and judgment.<sup>2</sup> 1. By “knowledge,” strictly speaking, is meant when we have an actual perception of the agreement or disagreement of any of our ideas;<sup>3</sup> and it is only to such a perception that the term “certainty” is properly applicable.<sup>4</sup> Knowledge is *intuitive*, when this agreement or disagreement is perceived immediately by comparison of the ideas themselves: *demonstrative*, when it is only perceived mediately, *i. e.*, when it is deduced from a comparison of each with intervening ideas which have a constant and immutable connection with them; as in the case of mathematical truths of which the mind has taken in the proofs. And, lastly, when through the agency of our senses we obtain a perception of the existence of external objects, our knowledge is said to be *sensitive*.<sup>5</sup> But *knowledge* and *certainty* are constantly used in a secondary sense which it is important not to overlook; viz., as synonymous with settled belief or reasonable conviction; as when we say that such a one received stolen goods *knowing* them to have been stolen; or that we are *certain*, or *morally certain*, of the existence of such a fact, &c.<sup>6</sup>

<sup>1</sup> Locke, bk. 4, ch. 1, § 7. Perhaps, in order to avoid prejudging a highly metaphysical question, we should say “objects existing, or appearing to our faculties to exist, without the mind, &c.”

<sup>2</sup> Locke, bk. 4, ch. 14, § 4, and ch. 1, § 7.

<sup>3</sup> Id., bk. 4, ch. 1, § 2.

<sup>4</sup> Id., bk. 4, ch. 4, §§ 7, 18.

<sup>5</sup> Locke, bk. 4, ch. 2 and 11.

<sup>6</sup> Pufendorf, Jus. Nat. et Gent. lib. 1, c. 2, § 11; Butler's Analogy of Religion, Introduction.

*Judgment — Probability.*

§ 7. "Judgment," the other faculty of the mind, though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening [\*8] ideas whose connection with them is \*either not constant and immutable, or is not perceived to be so.<sup>1</sup> The foundation of this is the *probability* or likelihood of that agreement or disagreement, that truth or falsehood, deduced or *presumed* from its conformity or repugnancy to our knowledge, observation and experience.<sup>2</sup> Judgment is often based on the testimony of others vouching their observation or experience;<sup>3</sup> but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators.

*Extensive Sphere of.*

§ 8. Actual knowledge and certainty extending a comparatively little way, men are compelled to resort to judgment and act on probability in by far the greater number of their speculations, as well as in the transactions of life, both ordinary and extraordinary, trivial and important.<sup>4</sup> The faculty of judgment is conversant not

<sup>1</sup> Locke, bk. 4, ch. 15, § 1, and ch. 14, § 3.

<sup>2</sup> Locke, ch. 15, §§ 3 and 4; ch. 14, § 4; Butler's *Analogy of Religion*, Introduction.

<sup>3</sup> Locke, ch. 15, § 4.

<sup>4</sup> Locke, bk. 4, ch. 14, § 1; Butler's *Analogy of Religion*, Introduction; 8 Bentham's *Judicial Evidence*, 351; Gilb. Ev. 3, 4, 4th Ed.

only about matters of fact, which, falling under the observation of our senses, are capable of being proved by human testimony, but also about the operations of nature and other things beyond the discovery of our senses;<sup>1</sup> and thus embraces the enormous class of subjects investigated by analogy and induction.<sup>2</sup> But here it is important to remark that on the same matter one man may have knowledge and certainty, while another has only judgment and probability: as when a man, either from ignorance of mathematical principles or laziness to go through the proofs, receives a mathematical truth on the testimony of one who comprehends it; in this case he has only got moral evidence \*of that [\*9] truth, while his informant has demonstrative proof.<sup>3</sup>

*Persuasion Resulting from.*

§ 9. Another great distinction between knowledge and judgment remains to be pointed out. The former is, as we have seen, reducible to three kinds; but to classify the degrees of persuasion resulting from judgment is wholly beyond human power; for the extent to which facts or propositions may be in conformity with our antecedent knowledge, observation or experience, necessarily varies ad infinitum. An attempt has been made to express some of the shades of judgment by the terms assurance, confidence, confident belief, belief, conjecture, guess, doubt, wavering, distrust, disbelief, &c.<sup>4</sup>

<sup>1</sup> Locke, bk. 4, ch. 16, §§ 5 and 12.

<sup>2</sup> Id., § 12, and Bonnier, *Traité des Preuves*, §§ 9, *et seq.*, 2nd Ed.

<sup>3</sup> Locke, bk. 4, ch. 15, § 1; and ch. 14, § 3; 1 Greenl. Evid. § 1, note (1), 7th Ed.

<sup>4</sup> *Suprà*, § 6.

<sup>5</sup> Locke, bk. 4, ch. 16, §§ 6—9.

*Proof.*

§ 10. The word PROOF seems properly to mean any thing which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition ;<sup>1</sup> and as truths differ, the proofs adapted to them differ also.<sup>2</sup> Thus the proofs of a mathematical problem or theorem are the intermediate ideas which form the links in the chain of demonstration : the proofs of any thing established by induction are the facts from which it is inferred, &c. : and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents, and the like. Some authors use the terms “factum probandum” and “factum probans” to designate respectively the fact to be proved and that by which [\*10] it is proved.<sup>3</sup> “Proof” is also \*applied to the conviction generated in the mind by proof properly so called.<sup>4</sup>

*Evidence.*

§ 11. The word EVIDENCE signifies in its original sense the state of being evident, i. e., plain, apparent or notorious.<sup>5</sup> But by a beautiful and almost peculiar inflection

<sup>1</sup> Domat, *Les Loix Civiles dans leur Ordre Naturel*, part 1, liv. 3, tit. 6 ; Bou-  
niet, *Traité des Preuves*, § 5, 2nd Ed.

<sup>2</sup> Domat in loc. cit.

<sup>3</sup> 3 Benth. *Jud. Ev.* 3 ; *Wills, Circ. Ev.* 15, 136, 137, 153, 3rd Ed.

<sup>4</sup> Matthæus de *Probationibus*, c. 1, N. 1 ; Huberus, *Prælectiones Juris Civilis*,  
lib. 22, tit. 3, n. 2 ; 1 Greenl. *Ev.* § 1, 7th Ed.

<sup>5</sup> Johns. *Dict.* The Latin “evidentia,” and the French “évidence,” are com-  
monly restricted by foreign jurists to those cases where conviction is produced  
by the testimony of our senses : See Quintilian, *Inst. Orat.* lib. 6, c. 2 ; Calvin,  
*Lexic. Jurid.* ; Steph. *Thesaur. Ling. Lat.* ; Domat, *Loix Civiles*, part 1, liv. 3,  
tit. 6 ; Bonnier, *Traité des Preuves*, §§ 6, 8, 9, 82, &c., 2nd Ed. All relating to  
evidence, as the term is used in English law, is treated of by the Civilians and  
Canonists under the head “probatio,” and by the French writers under that  
of “preuve.”

of our language<sup>1</sup> it is applied to that which tends to render evident, or to generate proof. This is the sense in which it is commonly used in our law books, and will be used throughout this work. Evidence, thus understood, has been well defined any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact.<sup>2</sup> The fact sought to be proved is termed "the principal fact:" the fact which tends to establish it, "the evidentiary fact."<sup>3</sup> When the chain consists of more than two parts, the intermediate links are principal facts with respect to those below and evidentiary facts with respect to those above them. Such we propose to call "sub-alternate" principal and evidentiary facts.

*Divisions of facts — Physical and psychological.*

§ 12. Confining ourselves henceforward to *truths of fact* — the proper object of the present treatise — we shall first direct attention to some divisions of [\*11] them, which, as connected with jurisprudence especially, it will be convenient to bear in mind. In the first place, then, facts are either *physical* or *psychological*.<sup>4</sup> By "physical facts" is meant such as either have their seat in some inanimate being, or if in an animate then not by virtue of the qualities which constitute it such; while "psychological facts" are those which have their seat in

<sup>1</sup> It has the same meaning in Norman-French; see int. al. T. 18 Edw. II. 614, tit. Replegg.; 9 Edw. III. 5, 6, pl. 11.

<sup>2</sup> 1 Benth. Jud. Ev. 17. "Evidence," Evidentia, signifies generally any proof, be it testimony of men, records or writings: Cowel's Interpreter; and Les Termes de la Ley. See Co. Litt. 283, a.

<sup>3</sup> 1 Benth. Jud. Ev. 18.

<sup>4</sup> 1 Benth. Jud. Ev. 45.

an animate being by virtue of the qualities by which it is constituted animate. Thus; the existence of visible objects, the outward acts of intelligent agents, the *res gestæ* of a lawsuit, &c., range themselves under the former class: while to the latter belong such as only exist in the mind of an individual; as, for instance, the sensations or recollections of which he is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts, &c. Psychological facts are obviously incapable of direct proof by the testimony of witnesses — their existence can only be ascertained either by confession of the party whose mind is their seat<sup>1</sup> — “*index animi sermo*”<sup>2</sup> — or by presumptive inference from physical ones.<sup>3</sup>

*Events and states of things — Positive or affirmative and negative.*

§ 13. There are two other divisions of facts which deserve to be noted. One is, that they are either *events* or *states of things*.<sup>4</sup> By an “event” is meant some motion or change considered as having come about either in the course of nature, or through the agency of human will; in which latter case it is called “an act,” or “an action.” The fall of a tree is “an event,” the [\*12] \*existence of the tree is “a state of things;” but both are alike “facts.”<sup>5</sup> The remaining division of facts is into *positive* or *affirmative* and *negative*.<sup>6</sup> a

<sup>1</sup> Mascardus de Probationibus, Concl. 309; 1 Benth. Jud. Ev. 82, 145; 3 Id. 6.

<sup>2</sup> Edrich's Case, 5 Co. 118 b.

<sup>3</sup> Mascard. de Prob. Concl. 94; 1 Benth. Jud. Ev. 82, 145; 3 Id. 6.

<sup>4</sup> 1 Benth. Jud. Ev. 47.

<sup>5</sup> 1 Benth. Jud. Ev. 48.

<sup>6</sup> Id. 49.



distinction which, unlike both the former, does not belong to the nature of the facts themselves, but to that of the discourse which we employ in speaking of them.<sup>1</sup> The existence of a certain state of things is a positive or affirmative fact, the non-existence of it is a negative fact. But the only really existing facts are positive ones — for a negative fact is nothing more than the non-existence of a positive one; and the non-existence of a negative fact is equivalent to the existence of the correspondent and opposite positive fact.<sup>2</sup>

*Evidence is either ab intrâ or ab extrâ.*

§ 14. Our persuasion of the existence or non-existence of facts has its source, or efficient cause, either in the operation of our own perceptive or intellectual faculties, or in the operation of the like faculties on the part of others, evidenced to us either by discourse or deportment. The former of these may be called evidence *ab intrâ*; the latter, evidence *ab extrâ*.<sup>3</sup> The immense part which evidence *ab extrâ* bears in forensic procedure, as well as in almost every thing else, makes it advisable that we should consider somewhat at large the grounds of belief in human testimony, and the dangers to be avoided when dealing with it.

*Natural tendency of the mind to believe human testimony.*

§ 15. The existence of a strong tendency in the human mind to accept as true what has been related by others is universally admitted, and confirmed by every day's observation; and it may be laid down as equally certain

<sup>1</sup> Id.

<sup>2</sup> 1 Benth. Jud. Ev. 49, 50.

<sup>3</sup> Id. 51, 52.

that one cause of this tendency is our experience of the great preponderance of truth over falsehood in human testimony, taken as a whole. But whether this is the [\* 13] *\*sole* cause has given rise to difference of opinion. Writers on natural law describe man as endowed by nature with a sort of moral instinct, which prompts him to act in certain cases where vigor and expedition are required, and the faculties of reason and reflection are either immatured, or, if matured, would be too slow :<sup>1</sup> and most authors think that a tendency to believe the statements of others is to be found among the operations of this instinct. Man, they argue, is so constituted that the knowledge which he can acquire through his personal experience is necessarily very limited, and, unless by some effective provision of nature he were enabled, and indeed compelled, to avail himself of the knowledge and experience of others, the world could neither be governed nor improved. The instinctive character of the tendency in question, they say, appears from the undoubted fact that it is immeasurably strongest in childhood, and diminishes when experience has made us acquainted with falsehood and deception.<sup>2</sup> Others, however, deny all this ;<sup>3</sup> and it has been urged that the implicit belief so observable in children is owing to their experience being all or nearly all, on one side—namely, in favor of the truth of what they hear.<sup>4</sup>

<sup>1</sup> Burlamaqui, *Principes du Droit de la Nature et des Gens*, pt. 2, ch. 3.

<sup>2</sup> 1 Greenl. Ev. § 7, 7th Ed., and the authorities there cited.

<sup>3</sup> 1 Benth. Jud. Ev. 127-130; Paley's *Moral and Political Philosophy*, bk. 1, ch. 5.

<sup>4</sup> 1 Benth. Jud. Ev. 129, 130.

*Sanctions of truth — The natural sanction.*

§ 16. However this may be, it is certain that the enunciation of truth and eloignement of *willful* falsehood among men in their intercourse with each other, are secured by three guarantees or sanctions — the *natural* sanction, the *moral* or *popular* sanction, and the *religious* sanction.<sup>1</sup> And, first, of the *natural* sanction. Mutual \*confidence between man and man being indis- [\* 14] pensable to the acquisition of knowledge, the happiness of our race, and indeed to the very existence of society, the great Creator has planted the springs of truth very deep in the human breast. According to Bentham, the natural sanction is altogether physical in its character, arising out of the love of ease, memory being prompter than invention.<sup>2</sup> “To relate incidents as they have really happened,” he says,<sup>3</sup> “is the work of the memory: to relate them otherwise than as they have really happened, is the work of the invention. But, generally speaking, comparing the work of the memory with that of the invention, the latter will be found by much the harder work. The ideas presented by the memory present themselves in the first instance, and as it were of their own accord: the ideas presented by the invention, by the imagination, do not present themselves without labor and exertion. In the first instance come the true

<sup>1</sup> 1 Benth. Jud. Ev. 198; 5 Id. 635, 636. See Bonnier, *Traité des Preuves*, §§ 220, 221, 222, 2nd Ed. For the reasons stated in the text, we have adopted the phrase “*natural* sanction,” used by Bonnier, in preference to “*physical* sanction” used by Bentham. The *legal* or *political* sanction of truth, and *oaths*, which are only an application of the religious sanction, being both artificial in their nature, will be more properly considered in the next Part.

<sup>2</sup> 2 Benth. Jud. Ev. 2.

<sup>3</sup> 1 Benth. Jud. Ev. 202, 203. See also 1 Stark. Ev. 14, 3rd Ed. and Id. 20, 4th Ed.

facts presented by the memory, which facts must be put aside: they are constantly presenting themselves, and as constantly must the door be shut against them. The false facts, for which the imagination is drawn upon, are not to be got at without effort: not only so, but, if, in the search made after them, any at all present themselves, different ones will present themselves for the same place: to the labor of investigation is thus added the labor of selection." It is, however, very doubtful whether this, although true as far as it goes, embraces the full extent of the natural sanction. Bonnier in his *Traité des Preuves*,<sup>1</sup> severely attacks the passages [\* 15] \*just quoted, and says that the natural sanction for the veracity of witnesses is to be found in a certain powerful feeling in the human mind which impels man to speak the truth, and makes him do violence to himself whenever he betrays it; that the true and the just are two poles toward which the human mind, when uncorrupted, continually points. And somewhat similar language is used by Lord Bacon.<sup>2</sup> In another part of the same work, however,<sup>3</sup> Bentham mentions the *sympathetic* sanction as a branch of the natural one, describing it to be the feeling by which we are deterred from falsehood by the regret for the pain and injury which it may cause others. He also considers the imperfection of the natural sanction to consist in its being better calculated to prevent falsehood in toto than to secure circumstantial truth in particulars;<sup>4</sup>

<sup>1</sup> § 221, 2nd Ed. In another place, § 15, 2nd Ed., he says, "S'il y a une tendance naturelle des esprits vers le vrai, comme des corps vers le centre de la terre, l'homme étant libre, peut obéir ou ne pas obéir à cette tendance, et il n'arrive que trop souvent que ses déclarations soient mensongères."

<sup>2</sup> Essay on Truth.

<sup>3</sup> 5 Benth. Jud. Ev. 636.

<sup>4</sup> 1 Benth. Jud. Ev. 207, 208.

which, taking his definition of that sanction, is no doubt the case.

*The moral sanction.*

§ 17. The *moral* sanction may be described in a word. Men having found the advantages of truth and the inconveniences of falsehood in their mutual intercourse, and, perhaps, further actuated by the reflection that truth is in conformity with the will of God and the laws of nature, have by general consent affixed the brand of disgrace on voluntary departure from it; and hence, as observed by several authors, the infamy attached to the word "liar."<sup>1</sup> A great infirmity of the moral sanction is, that deriving, as it does, all its force from the value men set on the opinions of others, it naturally teaches them to conceal their own faults from public view, even at the sacrifice of truth.<sup>2</sup>

*The religious sanction.*

\*§ 18. Lastly, there is the *religious* sanction; [\*16] which is founded on the belief that truth is acceptable and falsehood abhorrent to the Governor of the Universe, and that he will, in some way, reward the one and punish the other. All forms of religious belief acknowledge this great principle; and the following argument, among others, has been used to show that it is a precept of *natural* religion. "We are so constituted that obedience to the law of veracity is absolutely necessary to our happiness. Were we to lose either our feeling of obligation to tell the truth, or our disposition to receive

<sup>1</sup> See Pufendorf, *Jus. Nat. et Gent.* lib. 4, cap. 1, § 8; Benth. *Jud. Ev.* bk. 1, ch. 11, sect. 5, and Lord Bacon's *Essay on Truth*.

<sup>2</sup> 1 Benth. *Jud. Ev.* 212-216.

as truth whatever is told to us, there would at once be an end to all science and all knowledge, beyond that which every man had obtained by his own personal observation and experience. No man could profit by the discoveries of his contemporaries, much less by the discoveries of those men who have gone before him. Language would be useless, and we should be but little removed from the brutes. Every one must be aware, upon the slightest reflection, that a community of entire liars could not exist in a state of society. The effects of such a course of conduct, upon the whole, show us what is the will of God in the individual case." The divine punishment for falsehood being prospective and invisible detracts much from the weight of this sanction, and perjury is often committed by persons whose religious faith cannot be doubted, but who presumptuously hope, either by their subsequent good conduct or some other means, to efface its guilt in the eyes of Heaven.

*Powerful influence of them.*

§ 19. The effect of these three sanctions is much greater than might at first sight be supposed. They are in continual operation as efficient causes for the production of truth, and rendering its enunciation natural and habitual to men ; while every incentive to falsehood can only be [\* 17] looked upon as a species of disturbing force, \*which acts occasionally and exceptionally. Of few persons indeed can it be said that their adherence to truth is undeviating at all times ; with many its observance appears to depend on circumstance, accident, or caprice ; with some the practice of lying seems inveterate ; while

<sup>1</sup> Wayland's Elements of Moral Science, p. 272, London. See, also, a paper by Addison, in the "Spectator," No. 507.

certain classes of persons systematically, and as it were on principle, withhold the truth from other classes on particular subjects. But after every abatement has been made for aberrations, the quantity of truth daily spoken immeasurably exceeds that of falsehood ;<sup>1</sup> and Bentham even goes so far as to assert, that “ from the mouth of the most egregious liar that ever existed, truth must have issued at least a hundred times for once that willful falsehood has taken its place.”<sup>2</sup>

*Sometimes produce falsehood instead of truth.*

§ 20. It is, however, of the utmost importance to observe that any of those springs of action which we have denominated “ sanctions of truth,” may be found on the wrong side, *i. e.*, producing falsehood instead of truth. If the natural sanction rests solely on a love of ease, that love, while it represses the invention of false facts, equally prevents the taxing the memory to give a perfect narrative of what has been witnessed ; and if supposed to spring from a love of truth and justice, the party called on to give evidence may consider the ends of *justice* advanced by withholding the *truth* ; as, for instance, where the disclosing it will induce the condemnation of a criminal whose prosecution, though strictly legal, he deems morally unjust, or whose future good behavior he thinks will be better insured by \*escape than punishment. [\* 18] But of the sanctions in question, none is so fre-

<sup>1</sup> Bonnier, *Traité des Preuves*, § 15, 2nd Ed.

<sup>2</sup> 5 Benth. Jud. Ev. 82. We have read somewhere of a country, the inhabitants of which purposely and systematically gave false answers to all questions respecting its topography. Still a traveller was enabled to obtain the information he wished for respecting it, by questioning them upon incidental and collateral facts, when, the truth naturally oozing out, supplied him with materials for arriving at the knowledge sought.

quently divided against itself as the moral. Conduct condemned by one portion of society is often applauded by the rest, and persons desirous of the good opinion of certain classes are often satisfied to attain it at the cost of sinking themselves in that of others, and tell or suppress the truth as may best advance that object. "The credibility of a witness," says the Marquis Baccaria,<sup>1</sup> "may be in some degree lessened when he is member of some private society, whose usages and maxims are either not well known, or different from those of the public. Such a man has not only his own passions but those of other people." Even the religious sanction has been enlisted in the cause of falsehood. Particular forms of religion allow it in certain cases,<sup>2</sup> and the truth has often been sacrificed by religious persons in order to avoid bringing scandal on their creeds.

*Credit due to human testimony—Intention of witness to narrate truly.*

§ 21. The credit due to human testimony, assuming that we correctly understand the language employed, is the compound ratio of the witness's means of acquaintance with what he narrates and of his intention to narrate it truly.<sup>3</sup> In estimating the latter, three

<sup>1</sup> "La credibilità di un testimonio può essere alcune volte sminuita, quando egli sia membro di alcuna società privata, di cui gli usi e le massime sieno o non ben conosciute, o diverse dalle pubbliche. Un tal uomo ha non solo le proprie, ma le altrui passioni." Beccaria, Dei Delitti e delle Pene, § 8.

<sup>2</sup> See Halhed's Code of Gentoo Laws, &c., cited *infra*, bk. 2, pt. 1, ch. 2. Whether a violation of truth is allowable in any, and if so, in what cases, has been much considered by moralists and divines. See Pufendorf, Jus Natur. et Gent. lib. 4, cap. 1, §§ 7 *et seq.*; Bentham's Jud. Ev. bk. 1, c. 11, sect. 5; Paley's Moral and Political Philosophy, bk. 3, pt. 1, ch. 15, &c.; and bk. 1, ch. 5. It is, however, universally agreed that the obligation to tell truth is the rule; the license to falsehood, if such exists, the exception.

<sup>3</sup> See *infra*, § 73, and notes.



things are to be attended to. 1. Whether he labors \*under any interest or bias, which may sway him to pervert the truth. 2. His veracity on former [\*19] occasions — evidenced either by our own experience or credible proof. 3. His manner and deportment in delivering his testimony. “Interrogabit iudex,” says one of the canonists,<sup>1</sup> “testes in quâlibet causâ, eosque diligenter examinabit, de singulis circumstantiis diligenter inquirens, de causis videlicet, de personis, loco, tempore, visu, auditu, scientiâ, credulitate, famâ, et certitudine, cæterisque, quæ ad rem facere, et negotio convenire existimabit. Illud quoque subtiliter animadvertere non omittet, quo vultu, quâ constantiâ, quâve animi trepidatione testes deponant; cùm interdum ex his, vel ipsis invitis testibus, magis quàm ex verborum serie rerum veritas elucescat.” “A consideration of the demeanor of the witness upon the trial,” says one of our books,<sup>2</sup> “and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself. An overforward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question, for the purpose of gaining time to consider the effect of his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction

<sup>1</sup> Lancelottus, Institutiones Juris Canonici, lib. 3, tit. 14, §§ 11, 12.

<sup>2</sup> 1 Stark. Ev. 547, 3rd Ed.; Id. 822, 823, 4th Ed.

to be impossible; an affectation of indifference; are all to a greater or less extent obvious marks of insincerity. On the other hand, his promptness and frankness in [\* 20] answering questions \*without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity." This, however, must be taken with some qualification. "A witness," says a modern writer,<sup>1</sup> "may be very honest, although his demeanor is, in some respects, open to censure, and deserves rebuke. Constitution of mind, habit, manner of life, may give him a coarse, blunt tongue, and a manner in appearance, yet not meant to be, uncivil or disrespectful. Such a rough, unrefined, nature or carriage may well consist with a habit of speaking the truth, with an abhorrence of falsehood, and a wish and determination to give true evidence. . . . Demeanor consisting in confusion, embarrassment, hesitation in replying to questions, and even vacillating or contradictory answers, are not necessarily a proof of dishonesty in a witness, because this deportment may arise from bashfulness, or timidity, and may be the natural and inevitable effect of an examination by a skillful, practiced, perhaps unscrupulous, advocate, whose aim in his questions is, to entangle, entrap and stupify the witness, and cause him to say and unsay any thing or every thing. It may not be good behavior in a witness, to suffer his eyes to wander about the court while he is under examination, but this conduct may not be unnatural in the midst perhaps of an entirely new scene to him; and the distraction of mind occasioned

<sup>1</sup> Ram on Facts, pp. 183-4.

by that employment of his eyes may well cause him, on returning to his duty, to answer hastily, and without consideration. But in all this there may be no intentional disrespect to the court; and the witness notwithstanding, may be a very honest one. Again, it happens to all persons occasionally, without thought to use one word for another, \*making the sense very different from [\* 21] what was intended: unconsciously we say that we did not mean to say. In like manner, a witness may inadvertently contradict himself."

*Capacity of witness.*

§ 22. The capacity of a party to give a faithful account of things depends on—1. The opportunities he has had of observing the matters he narrates. 2. His powers, either natural or acquired, of perception and observation; and here it is important to ascertain, whether he is a discreet, sober-minded person, or imaginative and imbued with a love of the marvellous, and also whether he lies under any bias likely to distort his judgment. 3. Whether the circumstances he narrates were likely to attract his attention, in consequence of their importance, either intrinsically or with relation to himself. "Where the chemist and the physician see a dangerous poison, the kitchen-maid may see nothing more than an immaterial flaw in one of her pans, the cook may behold an innocent means of recommending herself to the palate through the medium of the eye. Where the botanist sees a rare, and perhaps new, plant, the husbandman sees a weed: where the mineralogist sees a new ore, pregnant with some new metal, the laborer sees a lump of dirt, not distinguishable from the rest, unless it be by being heavier and more trou-

blesome.”<sup>1</sup> 4. His memory; and here, whether the transaction is ancient or recent, whether his recollection has been refreshed by memorandum, conversation, &c.

*Concurrent and conflicting testimonies.*

§ 23. The probative force arising from concurrent testimonies is the compound result of the probabilities of the testimonies taken singly.<sup>2</sup> But when testimonies conflict or clash with each other, we must form the best conclusion we can as to their *relative* values.

*Things to be considered when weighing testimony*—1.

*Consistency of the narration; 2. Possibility and probability of the matters related.*

[\* 22] \*§ 24. There are two things which must never be lost sight of when weighing testimony of any kind. 1. The consistency of the different parts of the narration. 2. The possibility or probability, the impossibility or improbability, of the matters related: which afford a sort of corroborative or counter-evidence of those matters. By probability, as already observed,<sup>3</sup> is meant the likelihood of any thing to be true, deduced from its conformity to our knowledge, observation and experience. When a supposed fact is so repugnant to the laws of nature, assumed for this purpose to be fixed and immutable,<sup>4</sup> that no amount of evidence could induce us to be-

<sup>1</sup> 1 Benth. Jud. Ev. 164-5.

<sup>2</sup> See *infra*, § 73, and notes.

<sup>3</sup> *Supra*, § 7.

<sup>4</sup> The judicial proceedings of modern times are conducted on the assumption that the laws of nature are fixed and immutable; not from disbelief in miraculous interposition, but because such interposition is unquestionably rare; and it would be dangerous in the highest degree if tribunals were allowed to adopt its supposed occurrence as a principle of decision.

lieve it, such supposed fact is said to be *impossible*, or *physically* impossible. There is likewise *moral* impossibility, which, however, is nothing more than a high degree of improbability.

§ 25. As the knowledge, observation and experience of men vary in every imaginable degree, their notions of possibility and probability might naturally be expected to differ; and we continually find that not only are the most opposite judgments formed as to the credence due to alleged facts, but that a fact which one man considers both possible and probable another holds to be physically impossible.<sup>1</sup> With respect to this kind of impossibility, our notions will be more or less \*accurate according to our acquaintance with the laws of nature; for many phenomena in apparent [\* 23] violation of her laws have been found, on examination, to be the regular consequences of others previously unknown. The story of the king of Siam has often been quoted, who believed everything the Dutch ambassador told him about Europe, until he mentioned that the water there in winter became so hard that men, horses, and even an elephant could walk on it, which that monarch at once pronounced a palpable falsehood.<sup>2</sup> About three centuries and a half ago, when Columbus declared his conviction that the East Indies could be reached by sailing westward, and offered to make the trial, the learned world was prepared to demonstrate its

<sup>1</sup> He may even *know* it to be so; *e. g.* — A plausible but fallacious chain of presumptive evidence tends to indicate A. as the person who committed a crime at B. His guilt may seem probable to C.; but D., E. and F. know that it is impossible, for at the moment the crime was perpetrated they were at G., and saw A. there.

<sup>2</sup> Locke, bk. 4, ch. 15, § 5.

*physical impossibility*;<sup>1</sup> while similar language has, in our own day, been applied to the project for effecting the passage of the Atlantic Ocean by steam. So the assertion that England could be crossed in a carriage traveling at the rate of sixty miles an hour; or that a message could, with the speed of lightning, be transmitted through many miles of sea, at the depth of twenty or thirty fathoms, would, for many ages past, by the great bulk of mankind at least, have been pronounced a lie too gross to require confutation; and the bare suggestion that a message might be transmitted in like manner from one shore of the Atlantic to the other, would either have consigned a man to confinement as a hopeless lunatic, or sent him to the stake as an emissary of the powers of darkness. And, lastly, different persons may consider the same thing possible, or even probable, for very opposite reasons. In the infancy of aërostation, when its attempts were watched with anxiety by the learned and [\* 24] ridiculed by the ignorant, some Japanese, \*on seeing a balloon ascend at St. Petersburg, expressed no surprise whatever; and being asked the cause of their unconcern, said it was nothing but magic, and in Japan they had practitioners in magic in abundance.<sup>2</sup>

*Misrepresentation, incompleteness and exaggeration.*

§ 26. Before dismissing this subject, it is to be observed, that falsehood in human testimony presents itself much more frequently in the shape of misrepresentation,

<sup>1</sup> See the Life of Columbus, by Washington Irving, vol. i. bk. 2, ch. 4. A curious fac-simile of the map of the world, as during the middle ages it was supposed to exist, is given in Miller's Testimony of the Rocks, p. 363.

<sup>2</sup> 3 Benth. Jud. Ev. 315. The Chapter on Improbability and Impossibility in Bentham's work on Judicial Evidence — bk. 5, ch. 16 — though an unfinished sketch, and by no means free from error, will repay perusal.

incompleteness, or exaggeration, than of total fabrication.<sup>1</sup> “Qui non liberè veritatem pronunciat, proditor veritatis est.”<sup>2</sup> A lie is never half so dangerous as when it is woven up with some indisputable verity; and hence the use of the comprehensive form of oath administered in English courts of justice, that the deposing witness is to tell “the truth, the whole truth, and nothing but the truth.” So, an extensive field of mischief is opened by mere exaggeration: for “as truth is made the groundwork of the picture, and fiction lends but light and shade, it often requires more patience and acuteness than most men possess, or are willing to exercise, to distinguish fact from fancy, and to repaint the narrative in its proper colors. In short, the intermixture of truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent.”<sup>3</sup>

*Divisions of evidence—Direct and indirect evidence—  
Direct evidence—Indirect or circumstantial evidence—  
Conclusive—Presumptive.*

\*§ 27. There are several divisions of evidence which, although in some degree arbitrary, it will [\* 25] be found useful to bear in mind. In the first place, then, evidence is either *direct* or *indirect*; according as the

<sup>1</sup> This is particularly the case when *words* are repeated. “Il tuono, il gesto, tutte ciò che precede e ciò che siegue, le differenti idee che gli uomini attaccano alle stesse parole, alterano e modificano in maniera i detti di un’ uomo, che è quasi impossibile il reprerle quali precisamente furono dette. Di più, le azioni violente, e fuori dell’ uso ordinario, quali sono i veri delitti, lasciano traccia di se nella moltitudine delle circostanze, e negli effetti che ne derivano, &c.: ma le parole non rimangono che nella memoria, per lo più infedele, e spesso sedotta, degli ascoltanti. Egli è adunque di gran lunga più facile una calunnia sulle parole che sulle azioni di un uomo.”—Beccaria, Dei Delitti e delle Pene, § 8.

<sup>2</sup> 11 Co. 83 a; 4 Inst. Epil.

<sup>3</sup> Tayl. Evid. § 46, 5th Ed., and Lectures there cited.

principal fact follows from the evidentiary — the *factum probandum* from the *factum probans* — immediately or by inference.<sup>1</sup> In jurisprudence, however, direct evidence is commonly used in a secondary sense, viz.: as limited to cases where the principal fact, or *factum probandum*, is attested directly by witnesses, things or documents.<sup>2</sup> Indirect evidence, known in forensic procedure by the name of “circumstantial evidence,”<sup>3</sup> is either conclusive or presumptive; *conclusive*, where the connection between the principal and evidentiary facts — the *factum probandum* and *factum probans* — is a necessary consequence of the laws of nature; *presumptive*, where it only rests on a greater or less degree of probability.<sup>4</sup>

[\*26] In practice this latter is termed “presumptive evidence;” obviously a secondary sense of the word: for direct evidence is in truth only presumptive, seeing

<sup>1</sup> “Prima quidem illa partitio ab Aristotele tradita, consensum ferè omnium meruit, alias esse probationes quas extrâ dicendi rationem acciperet orator; alias quas ex causâ traheret ipse, et quodammodo gigneret. Ideoque illas ἀτέχνους, id est inartificiales; has ἐντέχνους, id est artificiales vocaverunt:” Quintil. Inst. Orat. lib. 5, c. 1. See also Heinec. ad Pand. pars 4, § 116.

<sup>2</sup> “Omnis nostra probatio aut directa est aut obliqua. Directa cum id quod probare volumus ipsis tabulis aut testimoniis continetur. Obliqua cum id quod intendimus ex tabulis aut testimoniis argumentando colligitur:” Vinnius, Jurispr. Contract. lib. 4, c. 25. See also 1 Stark. Evidence, 15, 3rd Ed.; and Id. 21, 4th Ed.

<sup>3</sup> It may be doubted whether these terms are, strictly speaking, synonymous. Circumstantial evidence is that species of indirect evidence which municipal law deems sufficiently proximate to form the basis of judicial decision. Where, for instance, philosophical or historical truths are established by remote inference or analogy from facts, the evidence of those truths is *indirect*, but can scarcely be called *circumstantial*.

<sup>4</sup> “Dividuntur (signa) in has primas duas species, quod eorum alia sunt quæ necessaria sunt, quæ Græci vocant τεκμηρία; alia non necessaria, quæ σημεία. Priora illa sunt quæ aliter habere se non possunt \* \* \* Alia sunt signa non necessaria, quæ εἰκόρα Græci vocant:” Quintil. Inst. Orat. lib. 5, c. 9. Some editions have εἰκαῖα instead of εἰκόρα.



that it rests on a presumption of the accuracy and veracity of witnesses, things or documents.<sup>1</sup>

*Real and personal evidence.*

§ 28. Again, evidence is either *real* or *personal*.<sup>2</sup> By *real* evidence is meant evidence of which any object belonging to the class of *things* is the source, *persons* also included in respect of such properties as belong to them in common with things.<sup>3</sup> This sort of evidence may be either *immediate*, where the thing comes under the cognizance of our senses; or *reported*, where its existence is related to us by others. *Personal* evidence is that which is afforded by a human agent; either in the way of discourse, or by voluntary signs. Evidence supplied by observation of *involuntary* changes of countenance and deportment comes under the head of real evidence.<sup>4</sup>

*Original and derivative evidence—Forms of derivative evidence.*

§ 29. The next division of evidence deserves particular attention, both for its own sake, and because it will be found to run through the whole system of English forensic procedure.<sup>5</sup> It is this, that all evidence is either *original* or *unoriginal*. By *original* evidence is meant evidence, either *ab intrâ* or *ab extrâ*, which has

<sup>1</sup> *Suprà*, § 7.

<sup>2</sup> 1 Benth. Jud. Ev. 53.

<sup>3</sup> 3 Benth. Jud. Ev. 26; and 1 Id. 53. This is the "*evidentia rei vel facti*" of the civilians. Mascard. de Prob. Quæst. 8; Calv. Lexic. Jurid.; 1 Hagg. Cons. Rep. 105. See *infra*, bk. 2, pt. 2.

<sup>4</sup> We have slightly deviated from the definition given in 1 Benth. Jud. Ev. 53, 54.

<sup>5</sup> See bk. 1, pt. 1, and bk. 3, pt. 2, ch. 3 and 4.

an independent probative force of its own; *unoriginal*, also called *derivative*, *transmitted* or *secondhand* evidence, is that which derives its force from, through, or under, some other. And of this derivative evidence, there are five forms. 1. When supposed oral evidence [\* 27] <sup>\*is delivered through oral: this is *hearsay* evidence, in the strict and primary sense of the term.</sup> 2. When supposed written evidence is delivered through written. 3. When supposed oral evidence is delivered through written. 4. When supposed written evidence is delivered through oral. 5. When real evidence is *reported*, either by word of mouth or otherwise.<sup>1</sup>

*Infirmity of derivative evidence.*

§ 30. The infirmity of derivative evidence as compared with its primary source will be apparent on the slightest reflection. Take the most obvious case, — supposed oral evidence delivered through oral. A. deposes that B. told him that he witnessed a certain fact. If B. were the deposing witness there would be only two chances of error in believing his testimony: viz., that he may have been mistaken as to what he thought he witnessed; or, that his narrative may be intentionally false. But when his testimony comes to us *obstetricante manu*,<sup>2</sup> through the relation of A., two fresh chances of error are introduced, viz., that A. may have either mistaken the words uttered by B., or may intend to misrepresent them. There is indeed an additional, although weak, chance of obtaining the truth through double falsehood or mistake. E. g.,

<sup>1</sup> See 3 Benth. Jud. Ev. 396.

<sup>2</sup> This expression is to be found in the Vulgate, Job, xxvi. 13: "Spiritus ejus ornavit cœlos, & *obstetricante manu* ejus eductus est coluber tortuosus." See also Exod. i. 16: "Quando *Obstetricabit* Hebræas, &c."

the question is, at a certain time was X. at a certain place. A. was there and saw him; but, intending to deceive B., tells him he was not. B. believes this; but with the intention of deceiving, says to C., that A. told him that X. was there. In relying on this supposed statement of A., vouched by B., C. has got the truth.<sup>1</sup> It is perhaps superfluous to add that the danger increases the greater the number of media through which evidence has come; for with \*each additional witness, or other medium, [\* 28] two fresh chances of error are introduced.<sup>2</sup>

*Pre-appointed and casual evidence.*

§ 31. We shall notice one other division, the value of which has been too much overlooked. Evidence is either *pre-appointed*,<sup>3</sup> otherwise called *pre-constituted*,<sup>4</sup> or *casual*.<sup>5</sup> *Pre-appointed* evidence is defined by Bentham, in one place,<sup>6</sup> to be where “the creation or preservation of an article of evidence has been, either to public or private minds, an object of solicitude, and thence a final cause of arrangement taken in consequence, in the view of its serving to give effect to a right, or enforce an obligation, on some future contingent occasion; the evidence so created and preserved comes under the notion of *pre-appointed* evidence.” In another place<sup>7</sup> he speaks of it as *written* evidence, created with the design of being employed on the occasion and for the purpose of some suit, or cause, not individually determined. Under this head

<sup>1</sup> See Lacroix, Calcul des Probabilités, § 142.

<sup>2</sup> For the proof of historical facts by derivative evidence, see the second Part of this Introduction.

<sup>3</sup> “Pre-appointed evidence;” 1 Benth. Jud. Ev. 56; 2 Id. 435.

<sup>4</sup> “Preuves Préconstituées; Bonnier, Traité des Preuves, §§ 97 and 379, 2nd Ed.; and part. 2, liv. 2.

<sup>5</sup> “Casual Evidence,” Bentham’s Rationale of Evidence, &c., App. A., ch. 8.

<sup>6</sup> 2 Benth. Jud. Ev. 435.

<sup>7</sup> 1 Id. 56.

come public documents: such as records, registers, &c., together with deeds, wills, contracts and other instruments for the facilitating of proof on future occasions; which are drawn up by individuals either in compliance with the positive requirements of law, or with a view to the convenience of themselves or others. But it is a mistake to assume that this kind of evidence must necessarily be in a *written* form.<sup>1</sup> When a party about to do a deliberate act calls particular persons to witness, in order that they may be able to bear testimony to it on [\* 29] *\*future occasions, their evidence is pre-appointed or pre-constituted*, as much as a deed which professes to be made *in witness* of the matters which it contains. There are several instances in the Anglo-Saxon laws, where sales were required to be made in the presence of particular classes of persons, or in particular places.<sup>2</sup> A nuncupative will under the 29 Car. 2, c. 3, s. 19, was not good unless the testator "bid the persons present, or some of them, bear witness that such was his will, &c.;"<sup>3</sup> and the 2 & 3 Will. 4, c. 75, s. 8, enacts that any person may, "either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, direct that his body after death be examined anatomically, &c."<sup>4</sup> Any evidence not coming under the head of "pre-appointed evidence" may be denominated "casual evidence."<sup>5</sup>

<sup>1</sup> See Bonnier, *Traité des Preuves*, §§ 379, 380, 2nd Ed.

<sup>2</sup> See those collected in 1 Greenl. Ev. § 262, note (4), 7th Ed.

<sup>3</sup> See now 7 Will. 4 & 1 Vict. c. 26, s. 11.

<sup>4</sup> The direction given in Matth. xviii. 15, 16, seems a clear case of unwritten pre-appointed evidence: "If thy brother shall trespass against thee, go and tell him his fault, &c. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." See, also, Genesis, xxiii. 17, 18.

<sup>5</sup> "Casual Evidence," Bentham's *Rationale of Evidence*, &c., App. A., ch. 8.

## \*PART II.

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### *Judicial evidence.*

§ 32. Having considered the subject of evidence apart from jurisprudence and judicature, for the sake of distinction termed “natural” or “moral evidence,” we proceed to that of “JUDICIAL EVIDENCE,” which is a species of the former, with a view of showing its essential difference and characteristics.

### *Definition.*

§ 33. “Judicial evidence” may be defined the evidence received by courts of justice in proof or disproof of *facts*, the existence of which comes in question before them. By *facts* here must be understood the *res gestæ* of some suit, or other matter, to which when ascertained the law is to be applied; for although in logical accuracy the existence or non existence of a *law* is a question of fact, it is rarely spoken of as such, either by jurists or practitioners.<sup>1</sup> By “law” here we mean the general law of each country, which its tribunals are bound to know without proof; for they are not bound, at least in general, to take judicial cognizance of local customs<sup>2</sup> or the laws

<sup>1</sup> Voet. ad Pand. lib. 22, tit. 3, n. 8; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 7; Vinnius, Jurispr. Contr. lib. 4, cap. 25; Bonnier, Traité des Preuves, §§ 2 and 23, 2nd Ed. See also Co. Litt. 283 a; 1 Stark. Ev. 9, 3rd Ed., and 12, 4th Ed.

<sup>2</sup> Heinec. ad P. and Pars 4, § 119; Id., Pars 1, § 103; Co. Litt. 115 b; 175 b; Tayl. Ev. § 5, 5th Ed.

of foreign nations<sup>1</sup> — the existence of both of which must be proved as facts. (a)

<sup>1</sup> Story, Conf. Laws, § 637, *et seq.* 5th Ed. ; Ph. and Am. Ev. 624 ; Tayl. Ev. § 5, 5th Ed.

(a) There are comparatively few matters of which the courts will take *judicial* notice, without proof. But the courts of this country are much more liberal in this respect than the courts of England, and that for the reason that in this country there is less jealousy of the power of courts, and less apprehension of danger that their powers will be tyrannically or oppressively exercised, because they are created by, and derive all their support from, the people, who can make or unmake them, if necessity requires. But in this country even, the courts do not overstep the ordinary limits of common sense and sound discretion in the exercise of this power ; but there are matters so fixed, so certain, so essentially a part of the ordinary and usual experience of mankind, that to require proof in reference to their existence or operations would be over nice, and productive of useless expense and hardship upon parties. Therefore, our courts will take judicial notice, without proof, of all *public* acts of the State ; but private acts, or acts that are confined in their operation to a few persons, and have no general application or effect, must, if relied upon, be set forth in the pleadings, and proved upon trial, the same as any other fact. *Bowie v. City of Kansas*, 51 Mo. 454 ; *Covington Drawbridge Co. v. Shepard*, 20 How. (U. S.) 227.

Acts that affect public rights, as acts giving authority to individuals or corporations to make erections or improvements in public navigable streams which affect the rights of navigation, fishery, or any common, public right, will be regarded as public acts, although not specially made so in the act itself, and although its benefits or advantages are confined to a few persons. *Hammond v. Inloes*, 4 Md. 138.

It would seem, however, that this rule must be restricted to cases where public rights are measurably affected, and where, except for the "act," the acts done in pursuance of it would be a *public nuisance* ; that is, it must be such an invasion of public and common rights as to put every person upon inquiry as to the legality or otherwise of the act.

In order to make an "act" a public "act" within the rule, it is not necessary that it should be applicable equally to the whole State, but any act, which, although confined to a particular district, or part of the State, even though confined to a single township, or a part of a township, if it applies equally to such district, part of the State, or township, is a "public act," of which courts will take judicial notice without proof. Thus it has been held that a special act of the legislature extending the power of a single public officer, as an act extending the jurisdiction of a certain town constable throughout the county, is such an act as courts are bound to notice without proof. *Bizler v. Parker*, 3 Bush (Ky.), 166 ; *Levy v. State*, 6 Ind. 281. So of an act under which a person

*Its rules either exclusionary or investitive.*

[\* 32] \*§ 34. Judicial evidence, as already observed, is a species of the genus "evidence;" and is for the most part nothing more than natural evidence re-

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claims the office of judge of a particular court. *Clark v. Com.*, 29 Penn. St. 129. So of an act for the protection of fish in a certain river. *Burnham v. Webster*, 5 Mass. 266. So of an act providing for the survey of certain lands in a particular county, and providing that no sales of any portion of such lands should be made unless surveyed and marked. *Pierce v. Kimball*, 9 Greenleaf (Me.), 54. But contra, see *Allegheny v. Nelson*, 25 Penn. St. 332. So where an act, otherwise private and local, contains provisions that are public and general, the act, although partly local and partly public, will be deemed a public act, which need not be plead or proved. *People v. McCann*, 16 N. Y. 61; *Williams v. The People*, 24 id. 407.

Thus, an act authorizing a municipal corporation to raise money by tax, which also contained a clause that restricted or changed the jurisdiction of the courts in reference to actions in which such corporation was a party, was held to be a public statute, of which the court would take judicial notice. *Bretz v. The Mayor of N. Y.*, 6 Rob. (N. Y.) 330.

It will often be found difficult to determine precisely what statutes are, and what are not, "public statutes" when the statute only applies to a municipal corporation, or a certain district of the State. But the real test applied by the courts, and the real guide, seems to be, that an act which applies equally to all persons within the district designated, or to all persons doing or omitting to do a particular act, is a public statute within the rule. Thus in *Kirk v. Norvill*, 1 T. R. 125. Buller, J., says: "Though it be true that an act of parliament relating to trade in general is a public act, yet a statute which relates only to a certain trade is a private one." But in *King v. Briggs*, Skin. 428, the court defined the distinction between an act partly private and partly public, in this way, "although an act concern a particular thing, and therefore is private in its nature, yet if a forfeiture be given to the King by it, this makes it a public act."

So in *Samuel v. Evans*, 2 T. R. 569, the court held that, independent of the statute of Anne, an act providing that the sheriff might assign the bail bond was a public statute, of which the court would take notice without its being either plead or proved.

In *Holland's case*, 4 Coke, 79 a, the learned reporter defined the distinction between public statutes and private statutes thus: "The rule of the law is, that of general statutes the court ought to take notice, although they be not pleaded; otherwise of special or particular statutes; therefore, for the better understanding of your books in this point, and which shall be said in judgment of law, *statutum generale*, and which is *statutum speciale*, it is to be



strained or modified by rules of positive law.<sup>1</sup> Some of these rules are of an *exclusionary* nature, and reject as *legal* evidence facts in themselves entitled to considera-

<sup>1</sup> "Probatio est actus *judicialis*, quo de facto dubio fides fit judici." Heinec. ad Pand. pars 4, § 115. "Probatio est intentionis nostræ *legitima* fides, quam judici facit aut actor, aut reus." Matth. de Prob. c. 1, n. 1. See also Voet. ad Pand. lib. 22, tit. 3, n. 1. "Probatio est ostensio rei dubiæ per *legitimos modos* judici facienda, in causis apud ipsum judicem controversis, &c. Nec in definitione omisi 'per legitimos modos,' hac de causâ, quia multi sunt modi, ex quibus fit probatio, ut per testes, per instrumenta, per evidentiam facti, per justam præsumptionem, per conjecturam, et per multos alios modos, &c. Ea enim ratione dixi *legitimos*, ut ostenderem hujusmodi probationes *juxta legis-normam* debere fieri in hujusmodi probationibus observatam, hoc est secundum formam libelli, secundum quam pronuntiandum est ex allegatis." Mascardus de Prob. Quæst 2, n. 17, 21, 22, 23.

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known, that "*generale dicitur a genere, etc., speciale a specie ;*" and there are *genus, species et individua*. Spirituality is *genus* ; bishopric, deanery, etc., are *species*, and bishopric, or deanery of Norwich is individual. Therefore, it was resolved in this case that, forasmuch as the act of 21 Henry 8 concerns the whole spirituality in general, it was a general act, of which the judges ought to take notice ; and in *Claypool v. Carter*, Pasch. 31, it was held that an act of Parliament relating to Eton and Winchester colleges was a particular act, of which the judge should not take notice. So in *Elmer v. Gate*, 2 Roll. 466, that the stat. of 30 Eliz., relating to leases made by bishops, was a special act, because it concerned the bishops only, who are but *species* of spirituality."

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Thus it will be seen that, although an act may affect very many persons, yet, if it is not equal and general in its application to all, in the State or the locality to which it relates, it is a private act, which must be plead and proved ; but, if it is general in its effect, and applies equally to all within the locality to which it relates, it is a public act, of which the courts will take judicial notice. This is the modern rule, which varies essentially from the doctrine advanced in some of the reports. Yet, whenever a purely private act provides in certain events a forfeiture to the government, or in the case of a corporation, that the government in a certain contingency may take the property, they are deemed public acts. *Jenkins v. Union Turnpike Co.*, 1 Caines' Cas. (N. Y.) 86.

And indeed all acts which in anywise concern the government, or any of its co-ordinate branches, may be said to be public. Dwarris on Statutes, Vol. 2, p. 464.

So all acts in amendment of acts declared public by the terms of the original act. *Bank of Utica v. Smedes*, 3 Cowen (N. Y.), 684.

So acts authorizing all corporations of a particular class to do certain acts, as

tion. Others again are what may be called *investitive*, i. e., investing natural evidence with an artificial weight; and even in some instances, attributing the property of

all the railroads of the State to subscribe for the stock of other roads. *White v. Syracuse & Utica R. R. Co.*, 14 Barb. (N. Y.) 559.

Or indeed any statutes, providing penalties or remedies affecting all persons who may offend against them, when all persons may come within their purview, are regarded as public. *Pierce v. Kimball*, 9 Greenleaf (Me.), 54; *Hendee v. Ayres*, 12 Pick. (Mass.) 344.

Charters of municipal corporations are public acts, whether so declared in the act creating them or not, and need not be alleged in the pleadings, or proved on the trial, in actions where the provisions of such charters become material. *State v. Sherman*, 42 Mo. 210; *Griffing v. Gibb*, 2 Black (U. S.), 519; *Alexander v. Milwaukee*, 14 Wis. 247; *Brell v. McDonald*, 7 Kan. 426; *Case v. Mobile*, 30 Ala. 538; *Terry v. Milwaukee*, 15 Wis. 490; *Janesville v. Milwaukee, etc.*, R. R. Co., 7 id. 484; *Swaine v. Comstock*, 18 id. 463; *Smith v. Flourney*, 47 Ala. 345; *Bretz v. Mayor of N. Y.*, 6 Rob. (N. Y.) 325; *Fauntleroy v. Hannibal*, 1 Dill. (U. S.) 118; *Hawthorne v. Hoboken*, 3 Vroom (N. J.), 72; *Swaine v. Comstock*, 18 Wis. 463; *Payne v. Treadwell*, 16 Cal. 220, and all amendments thereto. *Hawthorne v. Hoboken*, ante; *Terry v. Milwaukee*, ante.

But when municipal corporations are formed under a general law, their organization and all the legal steps requisite to perfect their organization must be proved. So, where, by the terms of the charter, the question of acceptance is submitted to the people, its acceptance by them must be duly alleged and proved. *Johnson v. Common Council*, 16 Ind. 227.

By-laws of a municipal corporation are private acts and will not be judicially noticed. *Tucker v. Com.*, 4 Bush (Ky.), 40; *Mooney v. Kennett*, 19 Mo. 551; *Cox v. St. Louis*, 11 id. 431; *Garvin v. Wells*, 8 Clarke (Iowa), 286; *Barker v. Mayor of N. Y.*, 17 Wend. (N. Y.) But city courts will take judicial notice thereof. *Conboy v. Iowa City*, 2 Clarke (Iowa), 90; *State v. Lieber*, 11 id. 407.

Charters of private corporations are private acts, unless made public by the terms of the act creating them, and must be proved. *Drake v. Flewelling*, 33 Ala. 674; *Tucker v. Com.*, 8 Bush (Ky.), 440; *Perdicaris v. Trenton, etc.*, 5 Dutcher (N. J.), 367.

In Kentucky, courts are now by statute required to take judicial notice of all laws, public or private. *Collier v. Baptist, etc., Soc.*, 48 B. Monr. (Ky.) 68; but otherwise of charters of banks authorized to issue notes. *Buell v. Warner*, 33 Vt. 570; *Davis v. Bank of Fulton*, 31 Ga. 59; *Bank of Newberry v. Gr. C. R. R. Co.*, 9 Rich. (S. C.) 495; *Shaw v. State*, 3 Sneed (Tenn.), 86; *State Bank v. Watkins*, 1 Eng. (Ark.) 123.

But courts will not take judicial notice of the value of their notes although used as currency, nor of the depreciation of the national currency. *Feemster v. Ringo* 5 Monr. (Ky.) 336; *Madawell v. Holmes*, 40 Ala. 391; but see *State*

evidence to that which abstractly speaking has no probative force at all.

*Bank v. Watkins*, 1 Eng. (Ark.) 123, *contra*. But courts will take judicial notice of the *kind* of currency in use, and that gold and silver coin is no longer used as such, but has become an article of traffic and merchandise. *U. S. v. American Gold Coin*, 1 Woolw. (U. S.) 217; *Lampton v. Hazzard*, 3 Monr. (Ky.) 149; *Janes v. Overstreet*, 4 id. 547; and that contracts made at a particular time are made in reference to the particular currency then in use. *Buford v. Tucker*, 44 Ala. 89; also of the genuineness and value of American coin, as dimes, eagles, etc., and in a case where in an indictment the respondent was charged with the larceny of a gold coin called an American eagle without stating its value, this was held sufficient. *Daily v. State*, 10 Ind. 536; *U. S. v. Burns*, 5 McLean (U. S.), 23; *U. S. v. King*, id. 208. But the value of foreign coin or currency must be proved, unless its value has been fixed by congress. *Kermott v. Ayer*, 11 Mich. 181; *McButt v. Hoge*, 2 Hilt. (N. Y. C. P.) 81. Courts will not take judicial notice of *local* customs, or the meaning of devices used in a particular trade, and the same, if relied upon, must be proved; *Johnson v. Robertson*, 31 Md. 416; *Wheeler v. Webster*, 1 E. D. Smith (N. Y.), 1; *Harsh v. North*, 40 Penn. St. 241; *Humphreysville, etc., Co. v. Vt., etc., Co.*, 33 Vt. 92; *Turner v. Fish*, 28 Miss. 306; but otherwise of a general custom of merchants throughout the State; *Smith v. Miller*, 43 N. Y. 171; *Bronson v. Windsor*, 8 id. 182; or of one so universal and general that persons are presumed to know of it. *McKinnon v. Bliss*, 21 N. Y. 206; *Munn v. Burch*, 25 Ill. 35; *Gregory v. Baugh*, 4 Rand. (Va.) 611. And of the law merchant, *Jewell v. Centre*, 25 Ala. 498, and of commercial usage as to days *dies non*, as Sundays and Christmas. *Sassur v. Farmers' Bank*, 4 Md. 409. Courts will not generally take notice of historical facts. *McKinnon v. Bliss*, 21 N. Y. 206; *Gregory v. Baugh*, 4 Rand. (Va.) 611. Except matters of public history affecting the whole State or people. *Simonton v. Columbian Ins. Co.*, 37 N. Y. 174; *Payne v. Treadwell*, 16 Cal. 220; *Rice v. Shook*, 27 Ark. 137; *Killebreur v. Murphy*, 3 Heisk. (Tenn.) 346; *Cuyler v. Terrill*, 1 Abb. (U. S.) 169; *Stokes v. Macken*, 62 Barb. (N. Y.) 145. *Wood v. Wilder*, 43 N. Y. 164; *Ferdinand v. State*, 39 Ala. 706. As of the existence of civil war in the country. *Swinerton v. Columbia Ins. Co.*, *ante*.

Or of the separation of churches of the same denomination, as the separation of the Methodist church into two national bodies under the name of the Methodist Church North, and Methodist Church South. *Humphrey v. Burnside*, 4 Bush (Ky.), 215. Or that a certain college is a national institution. *Oxford Rate*, 8 E. & B. 184. Of the division of a State into towns. *State v. Powers*, 25 Conn. 48; *King v. Kent*, 29 Ala. 542.

Of the political and social condition of the people of the country over which their jurisdiction extends. *Irwin v. Phillips*, 5 Cal. 140. Of who from time to time presides over the patent office, or other executive or judicial department of the government, even though for a temporary, rather than a permanent

*Necessity and use of.*

§ 35. And here the question presents itself, whence the necessity, whence the utility of such rules? Doubtful

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purpose. *York & Maryland Line R. R. Co. v. Winans*, 17 How. (U. S.) 30. As to the history of a county; the places where courts are, or formerly have been held therein, and as to the times when said courts were held, and when the change in the place or time of the holding of courts was made. *Robertson v. Teal*, 9 Tex. 344; *Ross v. Austell*, 2 Cal. 183. And that it has adopted townships, and when. *Rock Island v. Steele*, 31 Ill. 543. Of who are public officers of the State, executive or judicial, and of any changes therein; the time when their term of office commenced, and when it ended, also of the genuineness of their signatures. *People v. Johr*, 22 Mich. 461; *Heizer v. State*, 12 Md. 330. As who is governor. *Wells v. Jackson, etc., Co.*, 47 N. H. 235; *Devoes v. Cal. Co.*, 32 Rep. 570; and of appointments made by him under the constitution and laws. *State v. Evans*, 8 Humph. (Tenn.) 110. Of who are judges of subordinate courts. *Kilpatrick v. Com.*, 31 Penn. 198. Of orders issued by competent military authority. *New Orleans v. Templeton*, 20 La. Ann. 141; *Lanfier v. Mester*, 18 id. 497; *Taylor v. Graham*, id. 656; of who are justices of the peace in the county where the court is held, and of the genuineness of their signatures. *Graham v. Anderson*, 42 Ill. 514; *Chambers v. People*, 4 Scaunm. (Ill.) 351.

Who are elected sheriffs, time when their term of office commences and when it ends, and of the genuineness of their signatures. *Rayland v. Wynns, adm.*, 37 Ala. 32; *Alexander v. Burnham*, 18 Wis. 199; *Wetherbee v. Dunn*, 32 Cal. 106; *Dyer v. Flint*, 21 Ill. 80; *Ingraham v. State*, 27 Ala. 17. But not who are deputy officers, sheriffs or otherwise. *Ward v. Henry*, 19 Wis. 76; *Joyce v. Joyce*, 5 Cal. 449; *State Bank v. Curran*, 5 Eng. (Ark.) 142; *Lund v. Patterson*, Minor (Ala.), 14. Who are the officers of the court, and in a case where the word clerk was omitted from the *jurat* of an affidavit, it was held sufficient, as the court was bound to know who was clerk, and whether his signature was genuine. *Mayor v. State*, 2 Sneed (Tenn.), 11; *Dyer v. Loat*, 57 Ill. 179; *Thompson v. Haskill*, 21 id. 215; *Bishop v. State*, 30 Ala. 34. But not who are officers of other courts. *Norwell v. McHenry*, 1 Mann. (Mich.) 227.

That a certain person is an attorney. *People v. Nevins*, 1 Hill (N. Y.), 154. And of the genuineness of his signature connected with professional acts done by him, but not in cases in which he is himself a party. *Masterson v. Le-Clare*, 4 Minn. 163. Also of what attorneys have appeared in a cause. *Symmes v. Mayor*, 21 Ind. 443. Who are executive and judicial officers of the United States, elected or appointed in pursuance of the constitution or laws of congress. *York & Md. Line R. R. Co. v. Winans*, 17 How. (U. S.) 30. Who are registrars of a county. *Fancher v. DeMontegre*, 1 Head (Tenn.), 40.

Of general elections. *Rice v. Mead*, 22 How. Pr. (N. Y.) 445; *Davis v. Best*,

and disputed facts, it may be said, forming the subject-matter about which natural and judicial evidence are alike conversant, and truth being ever one and the same,

2 Clarke (Iowa), 96; *State v. Minnick*, 15 id. 123. But not of elections in other States except where it is fixed by act of congress. *Taylor v. Renne*, 35 Barb. (N. Y.) 272; *Dale v. Wilson*, 16 Minn. 525. And who are elected to fill certain offices, when their term begins, when it ends, and of all changes therein, whether by death, resignation or otherwise, and of the genuineness of their signature. *Alexander v. Burnham*, 18 Wis. 199; *Wells v. Jackson*, 47 N. H. 235; *Ex parte Peterson*, 33 Ala. 74; *State v. Williams*, 5 Wis. 308; *Heizer v. State*, 12 Ind. 330; *Ragland v. Winn*, 1 Ala. 270; *Templeton v. Morgun*, 16 La. Ann. 438; *Ragland v. Winns' Admr.*, 37 Ala. 32.

Of the resignation or coming in of public officers. *Ex parte Peterson*, 33 Ala. 74; *State v. Williams*, 5 Wis. 308; *Heizer v. State*, 12 Ind. 330. And of the duties imposed upon persons or officers by State or national law respecting particular matters. *Semple v. Hagar*, 27 Cal. 163. Of the jurisdiction of courts of the State and of the United States, and of the acts giving it. *Meshke v. Van Daren*, 16 Wis. 319; *Bretz v. Mayor, etc., of N. Y.*, 6 Rob. (N. Y.) 326. That the State and townships are political bodies. *Le Grange v. Chapman*, 11 Mich. 499. Of constitutions of other States and powers thereby given to courts. *Butcher v. Brownsville*, 2 Kan. 70. That public streets in cities are public highways. *Whittaker v. Eighth Av. R. R. Co.*, 5 Rob. (N. Y.) 650. That municipal corporations have the power to improve streets. *Murray v. Titcomb*, 19 Ind. 135. Of the navigability of the streams of the State. *Nearderhauser v. State*, 28 Ind. 257; *Brown v. Scofield*, 8 Barb. (N. Y.) 237. But not as to what streams are floatable. *Adsit v. Allen*, 42 N. Y. 378; *Rhodes v. Otis*, 38 Ala. 578. Of the facilities for public travel between different points, the great lines of public travel and their connections. *Manning v. Gasparie*, 27 Ind. 399; *Smith v. N. Y. Central R. R. Co.*, 43 Barb. (N. Y.) 225; *Mayhee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514; *Hines v. Cochran*, 18 Ind. 175. Also, of facts that are a part of the experience of the day, as the usual length of time required for steam passage across the Atlantic. *Oppenheim v. Wolf*, 3 Sandf. Ch. (N. Y.) 571; 49 N. Y. Legal Obs. 259. Of the coincidence of the days of the week and month. *State v. Hammett*, 2 Eng. (Ark.) 492; *Sproul v. Lawrence*, 33 Ala. 106; *Seeman v. Owen*, 31 id. 167; *Mechanics' Bank v. Gibson*, 7 Wend. (N. Y.) 460; *Davis v. Petticolas*, 34 Lex. 27. Of the terms of court in the State, their commencement and close. *Pugh v. State*, 2 Head (Tenn.), 227; *Morgan v. State*, 12 Ind. 448; *McGinness v. State*, 24 id. 500; *Bethune v. Hale*, 45 Ala. 522. Of the area of an established county and the towns of which it is composed. *Board of Commissioners v. Spittler*, 13 Ind. 235; *Kidder v. Blaisdell*, 45 Me. 461. And where in an indictment an offense is stated to have been committed in a certain town, without naming the county, it is sufficient, as the court will take judicial notice of the county in which the town is situated. *Vanderwerker v. People*, 5 Wend. (N. Y.) 530. But in England the rule is otherwise.

must not any rules shackling the minds of tribunals in its investigation be a useless, if not mischievous, adjunct to laws? On examination however it will appear that a

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*Anonymous*, 1 Chitty, 31; *Rex v. Bourn*, Burr. 42; *Brune v. Thompson*, 2 A. & E. 789. Of what lands are held by the general government in the State; *Lewis v. Harris*, 31 Ala. 689; of the boundaries of the State; *State v. Dunwall*, 3 R. I. 480; and of all agreements in reference thereto; id.; *Thomas v. Stigers*, 5 Barr, 480; and of all changes therein; *People v. Snyder*, 41 N. Y. 397; and of counties; *Ross v. Reddick*, 1 Scam. (Ill.) 73; *State v. Tootle*, 2 Harring. (Del.) 541; *Goodwin v. Appleton*, 9 Shep. (Me.) 453; *Ham v. Ham*, 39 Me. 263; *State v. Jackson*, id. 291; and of municipal corporations, when the boundaries are defined in the act creating them; *Griffing v. Gibb*, 2 Black (U. S.), 519; *City Council of Montgomery v. M. & W. Plank Road Co.*, 31 Ala. 79; *Ham v. Ham*, 39 Me. 263; *Chapman v. Wilber*, 6 Hill (N. Y.), 475; *Bronson v. Gleason*, 7 Barb. (N. Y.) 472; but not where their boundary is purely a matter of municipal regulation, or of record under general laws; *Brune v. Thompson*, 2 Gale & D. 110.

Courts will take judicial notice of all matters that are a part of the experience and common knowledge of the day; *Oppenheim v. Wolf*, 3 Sandf. Ch. (N. Y.) 571; as that certain provinces are in a foreign country, and that they have governments, and courts, and that their courts proceed according to the usual course of the common law; *Lazier v. Westcott*, 26 N. Y. 146; *Cooke v. Wilson*, 37 Eng. Law & Eq. 361; but otherwise when the government has not recognized such foreign province; *Grierson v. Eyrie*, 9 Ves. 347; and it will take judicial notice whether such government has been recognized by the government under whose jurisdiction it acts. *Taylor v. Barclay*, 2 Sim. 213. So of wars in which this government is engaged, whether domestic or foreign; *Dolder v. Huntingfield*, 11 Ves. 292; but not of wars in which foreign countries are engaged; *Rex v. De Berenger*, 3 M. & S. 67; nor of articles of war unless published under authority of the government; *Rex v. Withers*, 5 T. R. 442; of the political divisions of the country and the location of States; *Price v. Page*, 24 Mo. 65; *City Council of Montgomery v. M. & W. Plank Road Co.*, 31 Ala. 79; where the principal rivers of the State lie, what sections they traverse, and what towns or cities they lie in; *City Council of Montgomery v. M. & W. Plank Road Co.*, ante; of the geographical position of falls on public navigable rivers, and whether there are or not pilots appointed on it; *Cash v. Clarke & Co.*, 7 Ind. 227; that other States have constitutions, and of their provisions. *Butcher v. Brownsville*, 2 Kan. 70.

The United States courts will take notice of the situation of a port in a foreign country, and what impediments, if any, exist in its entrance, and whether vessels of a certain draft can enter it. *The Peterhoff*, Blatchford's Prize Cases, 463.

While courts will take judicial notice of all the public statutes and laws of the State, yet it will not take judicial notice of the statutes, or common law

system of judicial proof is not only highly salutary and useful, but that an absolute necessity for it arises out of the very nature of municipal law and the functions of

of another State, but, any person relying upon such statute, or common law of another State, must prove them, as any other fact is proved. *Chumasero v. Gilbert*, 24 Ill. 293; *Wood et al. v. O'Connor*, 28 Vt. 776; *Rape v. Heaton*, 9 Wis. 328; *Charlotte v. Choteau*, 25 Mo. 465; *Stokes v. Macken*, 61 Barb. (N. Y.) 145; *Heathorn v. Shepherd*, 1 Blackf. (Ind.) 159; *Anderson v. Anderson*, 25 Tex. 637; *Candit v. Blackwell*, 4 Green (N. J.), 193; *Brimhall v. Van Campen*, 8 Minn. 13; *Bemis v. McKenzie*, 13 Fla. 553.

In the absence of allegations or proof to the contrary, courts will presume that the laws of another State or country are similar to those in the State in which the action is tried, and if different the party relying upon the distinction must prove what the law really is, in the State, the benefit of whose laws he invokes. *Bemis v. McKenzie*, 13 Fla. 553; *Taylor v. Boardman*, 25 Vt. 581; *Stokes v. Macken*, 62 Barb. (N. Y.) 145; *Anderson v. Anderson*, 23 Tex. 639; *Folk v. Folk*, id. 653; *Carey v. R. R. Co.*, 5 Clarke (Iowa), 357; *Fellows v. Menasha*, 11 Wis. 558; *Rape v. Heaton*, 9 Wis. 328; *Simms v. Express Co.*, 38 Ga. 129; *Hoyt v. McNill*, 13 Minn. 390; *Stevens v. Boomer*, 9 Humph. (Tenn.) 546; *Temple v. Hager*, 27 Cal. 163; *Hammond v. Inloes*, 4 Md. 138; *Palfrey v. Portland, etc., R. R. Co.*, 4 Allen (Mass.), 55.

But when the laws of the State in which the trial is had recognize official acts done under the laws of another State, the courts of the State recognizing such acts will take judicial notice of the laws of such other State, so far as is necessary to determine the validity of the acts alleged to be in conformity with them. *Carpenter v. Dexter*, 8 Wall. (U. S.) 513. So when the statutes of another State upon a particular matter have been made the subject of a judicial decision in a State, the courts of such State will take judicial notice of it, and if the statute has been repealed or altered, proof of such repeal or alteration must be duly made. *Graham v. Williams*, 21 La. Ann. 594. But the presumption that other States have adopted the same laws does not extend to laws imposing a penalty or forfeiture. *Hull v. Augustine*, 23 Wis. 383; *Campion v. Kille*, 2 McCarter (N. J.), 476; *Cutter v. Wright*, 22 N. Y. 472; *Billingsby v. Dean*, 11 Ind. 331.

When laws are unwritten, they may be proved by parol, but when written as statute laws, they must be proved by the production of the laws themselves. *Taylor v. Runyan*, 9 Iowa, 522; *Stevens v. Boomer*, 9 Humph. (Tenn.) 546; *Crosby v. Huston*, 1 Tex. 203; *Brimhall v. Van Campen*, 8 Minn. 13; *Woodard v. O'Connor*, 28 Vt. 776.

When the statute of another State has been incorporated into an act of Congress, it will be recognized without other proof. *Flannigan v. Washington Ins. Co.*, 7 Barr (Penn.), 306; *United States v. Turner*, 11 How. (U. S.) 663; *United States v. Phila. & N. O.*, id. 684; or when the laws of one State or nation are, or ever have been, operative in another, as where a State has

tribunals, and that some such system is to be found among the legal institutions of every country, we think we may say, without a single exception.

formerly wholly or in part been under the jurisdiction and laws of another State, the laws then in existence need not be proved. So, too, where the State has formerly been under the jurisdiction of a foreign government. Thus, where a State has formerly been under Spanish or Mexican government the courts of such States will judicially notice the laws of such governments in force at that time, so far as necessary in the action pending before it. *Doe v. Eslander*, 11 Ala. 1028; *Choteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, id. 581. So courts will take judicial notice of all public bodies incorporated by the State. *Jones v. Fales*, 4 Mass. 245; or of all acts of incorporation made public by statute. *Russell v. Branham*, 8 Blackf. (Ind.) 277.

The common law of all the States is presumed to be the same, and if different it must be proved by the evidence of some person familiar with it. *Warner v. Lusk*, 16 Mo. 102; *Nunno v. Davis*, 7 Tex. 26; *Bemis v. McKinzie*, 13 Fla. 553; *Stokes v. Macken*, 62 Barb. (N. Y.) 145. Or the court may act upon its own knowledge of the law of another State, and if it errs, as to its knowledge thereof, the judgment will be reversed. *State v. Delesdinier*, 7 Tex. 26. But the United States courts are presumed to know the laws of the several States, and will take judicial notice thereof. *Jasper v. Porter*, 2 McLean (U. S.), 579; *Merrill v. Dawson*, Hunt (U. S.), 563; *Jones v. Hays*, 4 McLean (U. S.), 521; *Wadsworth v. Spafford*, 2 id. 168.

In the case of isolated and peculiar nations not holding diplomatic relations with this country, parol evidence will be received as to its laws, but such evidence will only be allowed as conclusive, when it is so direct and positive as to leave no doubt or ambiguity. *Wilcox v. Phillips*, Wallace, Jr. (U. S.), 47. State courts will take judicial notice of all public acts of congress, and pamphlets issued by government containing them may be read. *Hammond v. Inloes*, 4 Md. 138; *White v. Guirons*, Minor (Ala.), 331; *Temple v. Hagar*, 27 Cal. 163; *Anonymous*, Buller's N. P. 222; *Burmand v. Nirat*, 1 C. & P. 578; *Bird v. State*, 21 Gratt. (Va.) 800; *Adm'r v. Chubb*, 16 Gratt. 284; *Wright v. Hawkins*, 28 Tex. 452; *Buchanan v. Whitman*, 36 Ind. 257. And of laws relating specially to the State in which the trial is had. *Papin v. Ryan*, 32 Miss. 21. And of all treaties made with foreign governments, and of the power of the president under the same, but not whether the powers under it have been exercised. *Dale v. Wilson*, 16 Minn. 525; *Carson v. Smith*, 5 id. 78; *Montgomery v. Duley*, 3 Wis. 709. So of the survey of lands in the State under acts of congress, and the dedication of portions of them to certain purposes. *Dickenson v. Bruden*, 30 Ill. 279; *Atwater v. Schenck*, 8 Wis. 160. Whether courts will take judicial notice of acts of congress relating only to the District of Columbia quere? *Adm'r v. Chubb*, 16 Gratt. (Va.) 284, yes; *Wright v. Paton*, 10 Johns. (N. Y.) 300, no. And when a transaction otherwise lawful is unlawful by reason of provisions in acts of congress, the court will dismiss the



*A handmaid to jurisprudence—Expletive and attributive justice.*

\*§ 36. The evidence adduced in courts of justice, being as it were a handmaid to juris- [\* 33] prudence, might reasonably be expected to partake of

action, even though the point is not raised by the defense. *Kessel v. Albertis*, 56 Barb. (N. Y.) 362. So, too, courts will take judicial notice of the laying out and surveying of lands under acts of congress, and of the method of their boundaries and descriptions. *Buchanan v. Whiteman*, 36 Ind. 25; *Atwater v. Schenck*, 9 Wis. 160; *Dickenson v. Breeden*, 30 Ill. 279.

And of the geographical divisions of the State when necessary to the determination of a question. *Hinckley v. Beckwith*, 23 Wis. 328; *Fancher v. De-Montague*, 1 Head (Tenn.), 41; *Mossman v. Forrest*, 27 Ind. 333; *Commissioners v. Spetter*, 13 Ind. 235; *Winnepisseogee Lake Co. v. Young*, 40 N. H. 420; *King v. Kent*, 29 Ala. 542; *Martin v. Martin*, 51 Me. 366; *Gilbert v. Moline*, 19 Iowa, 319; *Rock Island v. Steele*, 31 Ill. 543. Courts are bound to know the rules of the court of chancery. *Carter v. Pratt*, 9 Md. 67. So its own rules. *Cherry v. Baker*, 17 Md. 75; *Pugh v. Robinson*, 1 Tenn. 118. But not the rules of another court. *Scott v. Scott*, 17 Md. 78; *Van Sandan v. Turner*, L. J. (U. S.) 154. Nor of a scale of fees adopted by it under the provisions of a statute. *Pilkington v. Cooke*, 17 L. J. 141.

Nor of the rules and regulations adopted by any public board or body whether national or State, but such regulations, if relied upon, must be proved. *In re Ramsden*, 1 B. C. Rep. 133; *Hensley v. Tarpey*, 7 Cal. 288; *Palmer v. Aldridge*, 16 Barb. (N. Y.) 131. Nor of the rules or regulations of any church or society. *Young v. Ransom*, 31 Barb. (N. Y.) 49. Nor of the customs or regulations of any particular trade. *Dulch & Co. v. Mooney*, 12 Cal. 534. Courts will take judicial notice of the time when State and national laws go into effect. *Stute v. Bailey*, 16 Ind. 46; *Heuston v. Cincinnati, etc., R. R. Co.*, id. 275; *Berliner v. Waterloo*, 14 Wis. 378; *Attorney-General v. Foote*, 11 id. 14. So of their repeal, or any changes therein. *State v. O'Connor*, 13 La. Ann. 486. All acts found among the public laws, bearing the governor's signature, are presumed to have been constitutionally passed. *Ill. Cent. R. R. Co. v. Wren*, 43 Ill. 77; *Bedard v. Hull*, 44 id. 91.

All acts of the legislature are presumed to have been constitutionally passed, and so far as extrinsic evidence is concerned, this presumption is conclusive. *People v. Mahany*, 13 Mich. 481.

But in Illinois it is held that the contrary may be proved by the production of a duly certified copy of the legislative journal, but not by reference to the original journal, as the courts do not take judicial notice of such journals or of their genuineness. *Grab v. Cushman*, 45 Ill. 119; *Coleman v. Dobbins*,

the nature and follow the law of the science to which it is ancillary. And this impression is confirmed, not removed, by a closer examination of the subject; for it

9 Ind. 156. So courts take judicial notice of the maritime law. *Chandler v. Graves*, 2 H. Blackstone, 606. Courts will not take notice of the rates of interest in another country or State, nor in the absence of proof will it presume that interest is allowed upon a contract, note or other obligation, made in such country or State. *Ingram v. Drinkard*, 14 Tex. 351; *Cooke v. Cranford*, 1 id. 9; *Cavendar v. Guild*, 4 Cal. 250; *Ramsay v. McCawley*, 2 Tex. 189.

The laws of a foreign country, or of another State, may be proved by the testimony of any person who knows them, whether statutory or common law, and the person by whom such proof is made need not be a lawyer, but he must be able to satisfy the court that he is in a position to know them, and the court must be satisfied that he does. *American Life Insurance Trust Co. v. Rosengale*, Weekly Notes of Cases (Penn.), Vol. 1, p. 419. The judgments of a court of a foreign country, properly authenticated by the clerk of the court in which they were rendered, and duly certified by the secretary of State, and of the governor of the province with the provincial seal, will be treated as evidence. *Lazier v. Wescott*, 26 N. Y. 146.

Courts will take judicial notice of its own records and of their genuineness. *State v. Postlethwaite*, 14 Iowa, 446; *State v. Schilling*, id. 455. But it will not in one case take judicial notice of the record in another case pending in the same court. *People v. De La Guerre*, 24 Cal. 73. But it will of the records in a case on trial. *Paggett v. Curtis*, 15 La. Ann. 551. Nor that other suits are pending in the same court involving the same questions. *Lake Merced Water Co. v. Cowles*, 31 Cal. 215. Nor of the pendency of actions in the federal courts to settle the same questions. *Vassault v. Seitz*, 31 Cal. 225. Nor will it take judicial notice of any thing outside the record. Hence when the record does not show that a declaration was filed in the cause, it will not be presumed that one was filed. *Dart v. Lowe*, 5 Ind. 181. Nor will it take judicial notice that a *nolle pros* or conviction was entered by it in an action in another county. *State v. Edwards*, 19 Wis. 674.

United States courts will take judicial notice that a discharge in bankruptcy has been regularly obtained. *Lathrop v. Stewart*, 5 McLean (U. S.), 167. Courts will not take judicial notice of the genuineness of the signatures of the parties in a cause. *Alderson v. Bell*, 9 Cal. 315. Nor do they judicially know that lager beer is intoxicating; *People v. Hait*, 24 How. Pr. (N. Y.) 289; nor that wine is not; *Jackson v. State*, 19 Ind. 312; but the courts of Indiana do judicially know that whisky is; *Carman v. State*, 18 Ind. 54; and it is said that the police courts of Texas will take judicial notice that "*peach and honey*" is a gentleman's drink. (Unreported case.) Courts will not take judicial notice of facts not in themselves of judicial cognizance, as that Daniel Webster does not reside in the State of New York; *Wheeler v.*

will be found that the same reasons which give birth to municipal law itself, show the necessity for some authoritative regulation of the proofs resorted to in its admin-

*Webster*, 1 E. D. Smith (N. Y. C. P.), 1; *Wilkie v. Bolster*, 3 id. 327; nor of the value of an attorney's services in a case tried before it; *Pearson v. Darrington*, 32 Ala. 227; nor what is a fair and reasonable or usual commission on acceptances; *Seymour v. Morrow*, 11 Barb. (N. Y.) 80; nor of the ordinary abbreviation of proper names. *Stephens v. State*, 11 Ga. 225; *Russell v. Martin*, 15 Tex. 238. But, *contra*, see where it was held that a note signed "Christ. A." would be treated as a note signed "Christopher A.;" *Weaver v. McElhenon*, 13 Mo. 89; but will of ordinary abbreviations of common words, as that "adm'r" stands for administrator; *Moseley's Adm'r v. Masten*, 37 Ala. 216; nor that "John Smith" and "Hon. John Smith" are the same person; *Ellsworth v. Moore*, 5 Clarke (Iowa), 486; but identity of name is *prima facie* evidence of identity of person; *Gitt v. Watson*, 18 Mo. 274; and a certificate of birth, death or marriage from the proper office is admissible as evidence, without proof that the person named in the certificate is the same in reference to whom the certificate is to be used as evidence. The identity of name is *prima facie* proof of identity of person, and if not so in fact, the opposite party must prove it. *Hubbard v. Lees & Purdon*, 1 L. R. (Ex.) 255. But courts will not take judicial notice that "New York" is not in the State where the trial is had; *Bradshaw v. Mayfield*, 18 Tex. 21; or that "New Orleans" is in the State of Louisiana; *Riggins v. Collier*, 6 Mo. 568; or that "St. Louis" is in the State of Missouri; *Ellis v. Park*, 8 Tex. 205; or that a note payable at "New Orleans, La.," is payable in New Orleans, State of Louisiana; *Russell v. Martin*, 15 Tex. 238; nor that "Dublin" is in Ireland. *Kearney v. King*, 1 Chit. 28. But the courts of England do judicially know that "Geelong, Colony of Victoria," is a place outside of England. *Cooke v. Wilson*, 1 C. B. (N. S.) 153. Forms of attestation in other States must be proved. *Trigg v. Conway*, 1 Hemp. (Tenn.) 538. Quantities of land contained in certain courses and distances must be shown. *Tison v. Smith*, 8 Tex. 147. Courts will not take judicial notice that a woman past 49 years of age is past child-bearing. *Overhill's Trusts, In re*, 17 Eng. Law & Eq. 323. Courts will not recognize a private seal, whether of an officer or a private person. *Beach v. Workman*, 20 N. H. 379; *Barrett Nav. Co. v. Shower*, 8 Dowl. (C. P.) 173; *Ill. Cent. R. R. Co. v. Johnson*, 40 Ill. 35. They will take notice of the seasons, and of the time when certain agricultural products mature, and when the season of harvesting arrives; *Floyd v. Ricks*, 14 Ark. 286; but not of the vicissitudes incident thereto. *Dixon v. Nichols*, 39 Ill. 372. So of the ordinary course of transactions of human life, and whatever ought generally to be known, as the peculiar nature of lotteries and how they are generally carried on. *Boullemet v. State*, 28 Ala. 83. (But this is so only when the lotteries exist by virtue of State laws.) The age of a person, if material, must be proved. *Stephenson v. State*, 28 Ind. 27. On the trial of an issue directed by a court of

istration. But in order to set this in a clear light, we must point attention to a distinction often overlooked, and the losing sight of which has been the source of

equity the judge before whom the trial is had will take judicial notice of the terms of the order. *Wood v. Thompson*, 1 Car. & M. 171. So of the day of the week on which a certain day of the month was; *Hanson v. Shackleton*, 4 Dowl. (P. C.) 48; that a child born two months after marriage, when the husband had not access to the mother before marriage, is not his child. *Rex v. Luffe*, 8 East, 202. On what day the king died; *Henry v. Cole*, 2 Ld. Raym. 811; of the general law of bankers, and that they have a lien on the securities of their customers for advances made or services rendered; *Barnett v. Brandon*, 6 M. & G. 630; that rain falls. *Fay v. Prentice*, 14 L. J. (N. S.) 298. Courts will not take judicial notice of what is meant by the words "whaling voyage" in a policy of insurance; *Child v. Sun Mutual Ins. Co.*, 3 Sandf. (N. Y.) 26; but it will of the meaning of words in certain usual and common combinations. *Bap. Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; *Downs v. Sprague*, 2 Keyes, 57.

If a party relies upon a statute either as a ground of action or defense, he must, notwithstanding the fact that it is a public statute of which the court takes judicial notice, set forth in his declaration, or in his pleadings, such facts as bring him clearly within the provisions of the statute, or if in defense, where no special plea is required, show such facts as bring his case within the statute, and if there are any exceptions or provisos in the act, he must show negatively that the matter pleaded is not within the provisos or exceptions. This was expressly held in *Gill v. Scrivens*, 7 Durnford & E. 27; unless the proviso or exception is in a subsequent substantive clause or statute, and is not connected with the enacting clause by any word of reference; in which case it is a matter of defense for the other party, and need not be negatived in the pleadings. *Id.*; *Rex v. Jukes*, 8 D. & E. 542; *Rex v. Hall*, 1 id. 320; *Steele v. Smith*, 1 Barn. & Ald. 94.

In *Muller's Case*, 4 Ct. of Claims (U. S.), 61, the rule was stated thus: "Where the enacting clause of a statute makes an exception to the general provisions of the act, a party pleading the provisions of the statute must negative the exception, but when the exception is contained in a proviso, and not in the enacting clause, the party pleading the statute need not negative the exception. It is for the other party to set it up in avoidance of the other provisions of the statute. *McGlone v. Prosser*, 21 Wis. 273; *Lynch v. People*, 16 Mich. 472. A pleading setting forth the cause of action, or defense in the language of the statute relied on, is sufficient. *Gunter v. Dale Co.*, 44 Ala. 639; and he need set forth no more facts or circumstances than are necessary to support the pleading under the statute. *Hewett v. Harvey*, 46 Mo. 368.

There is still another matter which should be borne in mind, and that is, that where a statute gives a remedy where none existed at common law, or where it makes an act lawful which is not so regarded at common law, the

much mistake and confusion. According to writers on natural law, justice is divided into *expletive* and *attributive*.<sup>1</sup> By the former—sometimes also denominated

<sup>1</sup> Burlamaqui, *Principes du Droit de la Nature et des Gens*, pt. 1, ch. xi, § 11; Grotius, *De Jur. Bell. ac Pac. lib. 1, cap. 1, § viii*. “*Fabultatem respicit justitia expletrix, aptitudinem respicit attributrix* :” Grot. in loc.

party must state in his pleadings, and show upon the trial such a state of facts as bring his case clearly within the provisions of the statute as well as all amendments thereto. But where the statute is only declaratory of a common-law right, and in aid thereof, unless it in some way varies the standing or rights of parties in court, the statute, or any circumstances bringing the party within the provisions thereof, need not be stated in the pleadings, but otherwise when the statute gives any rights additional to the common-law right, or varies or changes the *status* of the parties. Note 2 to *Duppa v. Mayo*, 1 Wm. Saunders, 276; *Erlinger v. Bourceau*, 51 Ill. 94; *Ryan v. State*, 32 Tex. 280; *Hastings v. Cunningham*, 39 Cal. 137.

In actions brought upon a general or public statute, the declaration should state such facts as bring the case within the statute, and should state that the act complained of is contrary to the statute in such cases made and provided. *Lee v. Clarke*, 2 East, 332; but, if the facts and circumstances set forth in the pleading are sufficient to show that the act charged is in point of fact contrary to the statute relied on, the omission of the words “contrary to the form of the statute,” will not be treated as a defect. *Hewett v. Harvey*, 46 Mo. 368. It is the *substance*, and not the form of the pleading that controls. *State v. Dehlinger*, 46 Mo. 106; and the statute need not be set forth or named in the pleadings, as the courts are bound to take judicial notice of the statute, and whether the facts set forth in the pleadings are sufficient to sustain an action or defense under it. *McHarry v. Eastman*, 7 Rob. (N. Y.) 137.

If the action or defense is predicated upon the statute of another State, the statute relied on must be set forth with distinctness, so that the court can say upon inspection of the plea, what the effect of the law is, and a pleading that simply avers that by the laws of the State where the contract was made, certain results would ensue, is not an averment sufficient to support any proof as to what the fact is. *Hoyt v. McNiel*, 13 Minn. 390; *Roots v. Merriweather*, 8 Bush (Ky.), 397.

In all actions brought upon a private statute, the act must be recited, and such facts stated as disclose a right of action under it, and no more of the act will be noticed by the court than is set forth in the declaration; and the same is equally true as to the pleadings where the statute is relied upon in defense to an action. *Kirk v. Nowell*, 1 D. & E. 125; *Hewett v. Harvey*, 46 Mo. 106; *Gunter v. Dale Co.*, 44 Mo. 639.

In all cases where the statute is set forth either in the declaration or pleadings, great care should be observed, to set it forth correctly, as in the case of a misrecital of a general statute advantage may be taken of it either by gen-

rigorous justice, perfect justice, or justice properly so called — is meant that whereby we discharge to another duties to which he is entitled by virtue of a perfect and

eral demurrer, motion in arrest, or by writ of error, if the error is in any wise material, and the defect is not cured by verdict. But it seems that the misrecital must be of matter which goes to the ground of the action, or the defect will be cured by verdict. *Rex v. Marsack*, 6 D. & E. 776.

In *Love v. Walton*, Cro. Eliz. 245, it was held that in the case of a material misrecital of a public act, the court cannot give judgment even with the consent of the parties, for the reason that the courts are bound to take notice of all public acts, and to know that the statute is not as set forth in the pleadings, and this view was adopted in the case of *State v. Jarrett*, 17 Md. 309, where it was held that where a bill in equity contradicts the provisions of a public statute, the court will take judicial notice thereof, although the question is not raised upon trial.

So, too, care should be taken never to recite a public statute when its recital is unnecessary, for if it is recited, and incorrectly set forth, the misrecital is fatal if in a material matter. *Boyce v. Whittaker*, Douglass, 97, in which it was held that if the party undertakes to set forth a statute in his pleading, a misrecital is fatal. Lord Mansfield said: "If the defendant has unnecessarily set out the act of Parliament, he should be held to half a letter," and Buller, J., concurred.

But if the misrecital is immaterial or only a trifling variance the rule is otherwise. *Goodwin v. West*, Cro. Car. 522; *Anonymous*, 2 Ventris, 215. And in *McHarvey v. Eastman*, 7 Robt. (N. Y.) 137, it was held that where a party referred to the wrong section of a public act in his pleading, which was evidently a clerical error, it was wholly immaterial, as the court was bound to take judicial notice of the statutes, and hence were bound to know whether the facts set forth were a ground of action or defense *under any part of the statute*, but if the party had recited the portion of the statute in his plea, the rule would doubtless have been otherwise.

In all cases where the action or defense is predicated upon a private act, so much of the act as is relied on must be accurately set forth in the pleadings, and it is generally better to set it forth *in hæc verba*, and if there is a misrecital of the act, advantage must be taken of it by pleading *nul tiel record*, or by demurrer, as the court can take judicial notice of no more of the act than is recited in the pleadings. *Spring v. Eve*, 2 Mod. 241; *Platt v. Hill*, 1 Ld. Raymond, 382. *Nul tiel record* should not be pleaded when the defect is in reference to such matters as the court judicially notices, but only of such defects as go to the matter, or substance of the act, all other defects should be taken advantage of by demurrer. *Rex v. Wilde*, 1 Lev. 296; *Boyce v. Whittaker*, Doug. 97. See also *Moulson v. Redshaw*, 1 Saund. 193, where the practice in reference to pleading private acts is thoroughly discussed.

Public acts need not be proved, as the courts are bound to know their provisions; but if *nul tiel record* be pleaded, private acts must be proved, by an

rigorous obligation, the performance of which, if withheld, he has a right to exact by force. The latter consists in the discharge of duties arising out of an imperfect or non-rigorous obligation, the performance of which cannot be so exacted, but is left to each person's honor and conscience. These are comprehended under the appellations of humanity, charity, benevolence, etc.<sup>1</sup> Under a

<sup>1</sup> An excellent example of the difference between these two kinds of justice is afforded by the well-known anecdote of Cyrus, recorded by Xenophon, *Cyrop.* lib. 1, c. 3, and quoted by Grotius, in *loc. cit.* A big boy having a coat that was too small for him, and a little boy one that was too large for him, the big boy by force and against the will of the little one effected an exchange of coats; and Cyrus being appealed to adjudged that he was right. But the master said this decision was wrong—for the question was not which coat was best suited to each boy, but to which did the disputed coat belong—in other words Cyrus had proceeded to administer *attributive* justice, when his jurisdiction only extended to *expletive*. The passages in the Mosaic law, “Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honor the person of the mighty; but in righteousness shalt thou judge thy neighbor;” *Lev.* xix. 15, and also *Exod.* xxiii. 3, are likewise cited in illustration of this principle, which is amply supported by other passages of Scripture. See *Deut.* i. 17; xvi. 19; *Prov.* xviii. 5; xxiv. 23; xxviii. 21; *John*, vii. 24.

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exemplified copy of the act. *Anonymous*, 2 Salk. 566; or, by the production of a printed copy thereof printed by the State printer. *Rea v. Shaw*, 12 East, 497. When a private act is duly certified under the seal of the State, it cannot be impeached by the legislative journals. *Rea v. Arundel*, Hob. 110. In *Eld v. Gorham*, 20 Conn. 8, it was held that it is not competent for the court in an ordinary civil suit *inter partes* to permit any inquiry to be made into the correctness of the Revised Statutes duly certified and deposited in the office of the secretary of State, and that such statutes, so certified, import absolute verity, as the records of the legislature.

Public acts, being general laws, are presumed to be known to every person, as well to the jury as to the court, and need not be proved; but private acts must be proved by a duly exemplified copy. 1 Phillips on Ev. 364; 1 Starkie on Ev. 163; or by a copy printed by the King's printer and under authority. *Rea v. Shaw*, 12 East, 479. And this extends to laws of a foreign country when they are found in the statutes of that country accompanied with proof of their official publication. *O'Keefe v. United States*, 5 Ct. of Claims, 674. And the laws of another State. *Zimmermann v. Helsler*, 32 Md. 274. But the book must be authenticated under the seal of the secretary of State. *Babcock v. Babcock*, 46 Mo. 243.

[\* 34] \*system of municipal jurisprudence, expletive justice must be understood to mean that which may be claimed of strict legal right; and attributive justice that which tribunals can either not notice at all, or only in virtue of an equitable jurisdiction modifying and restraining the rigor of the law.

*Origin of municipal law.*

§ 37. So soon as societies were formed and the relations of sovereignty and subjection established, the imperfections of our nature indicated the necessity for municipal law. To administer perfect *attributive* justice, in all questions to which the innumerable combinations of human action give rise, is the high prerogative of Omniscience and Impeccability. For to this end are required not only an unclouded view of the facts as they have occurred, and a decision, alike unerring and uncorrupted, on the claims of the contending parties; but a complete foresight of all the consequences, both direct and collateral, and down to their remotest ramifications, which will follow from that decision. The hopelessness of ever accomplishing this became early visible to the reflecting portion of mankind; and the observation of nature<sup>1</sup> having taught them that great ends are best attained by the steady operation of fixed *general* laws, they conceived the notion of framing *general rules* for the government of society—rules based on the principle of securing the largest amount of truth and happiness in the largest number of cases, however their undeviating

<sup>1</sup> "Le ley imitate nature." Per Doddridge, J., in *Scheffeld v. Ratcliffe*, 2 Rol. R. 502. Sicut Natura non facit saltum, ita nec Lex; Co. Litt. 238 b. See also Co. Litt. 79a; Jenk. Cent. 1, Case 30; Hob. 144.



[\* 35] \*action may violate attributive justice or work injury in particular instances.<sup>1</sup> The rules estab-

<sup>1</sup> The finest description of municipal law to be found in any language is that of Demosthenes, in his first Oration against Aristogiton: quoted in Christian's edition of Blackstone's Comm. vol. i. p. 44, note: "Οἱ δὲ νόμοι τὸ δίκαιον καὶ τὸ καλὸν καὶ τὸ συμφέρον βούλονται, καὶ τῷτο ζητῶσι· καὶ ἐπειδὴν εὐρεῖται, κοινὸν τῷτο πρόσταγμα ἀπεδείχθαι, πᾶσιν ἴσον καὶ ὁμοιον· καὶ τῷτ' ἔστι νόμος, ᾧ πάντας προσήκει πείθεσθαι διὰ πολλὰ, καὶ μάλιστα, ὅτι πᾶς ἔστι νόμος εὐρημα μὲν καὶ δῶρον θεῶν, δόγμα δ' ἀνθρώπων φρονιμῶν, ἐπανόρθωμα δὲ τῶν ἐκείνων καὶ ἀκρίβειαν ἀμαρτημάτων, πόλεως δὲ συνθήκη κοινή, καὶ πᾶσι προσήκει ἑῇ τοῖς ἐν τῇ πόλει." The following, taken from the works of Isidore, Bishop of Seville, Etymol. lib. ii. c. 10, is also worthy of notice: "Erit autem lex, honesta, justa, possibilis, secundum naturam, secundum consuetudinem patriæ, loco temporisque conveniens, necessaria, utilis, manifesta quoque ne aliquid per obscuritatem in captionem contineat, nullo privato commodo, sed pro communi civium utilitate conscripta." See, also, Dig. lib. 1, tit. 3, l. 3 and 10; lib. 50, t. 17, l. 64. Our common law authorities are strong to the same effect—"Ad ea quæ frequentius accidunt jura adaptantur:" Co. Litt. 238 a; 2 Inst. 137; 5 Co. 127 b; 6 Co. 77 a. "Le ley est reasonable que provide pur le multitude, coment que ascun especial person ont perd' p. c. Vix ulla lex fieri potest quæ omnibus commoda sit, sed si majori parti pspiciat, utilis est." Plowd. 369. "There hardly exists," says Lord Ellenborough, in *R. v. The Inhabitants of Harringworth*, 4 M. & Sel. 350, "a general rule out of which does not grow, or may be stated to grow, some possible inconvenience from a strict observance of it. Nevertheless, the convenience of having certain fixed rules, which is far above any other consideration, had induced courts of justice to adopt them, without canvassing every particular inconvenience which ingenuity may suggest as likely to be derived from their application." In *P. 2 H. IV. 18*, B. pl. 6 (cited in the note to *Burgess v. Gray*, 1 C. B. 586), the counsel for a defendant in the C. P. argued thus: "This defendant is undone and impoverished for ever, if this action is maintained against him, for then twenty other such suits will be brought against him upon the like matter." Whereupon Thirning, C. J., interposed: "What is that to us? It is better that he should be quite undone than that the law should be changed for him." And, lastly, we would refer to the case of the Prohibitions del Roy in 12 Co. 63, M. 5 Jac. I. The archbishop had informed the king that he had a personal jurisdiction in ecclesiastical matters, which Sir Edward Coke, answering for himself and the rest of the judges denied, saying that the king in his own person cannot adjudge any case, but that it ought to be determined and adjudged in some court of justice, according to the law and custom of England, &c., &c. "Then," continues the report, p. 64, "the king said that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by me, that true it was, that God had endowed his majesty with excellent science,

[\* 36] lished by \*authority for this purpose in each country constitute its municipal law.

*Necessity for limiting the discretion of tribunals in determining facts.*

§ 38. The reasons for applying these principles of legislation to evidence received in courts of justice, although less obvious, are equally satisfactory with those which originated the principles themselves. In the first place then we would observe that the relations of cause and effect are manifestly innumerable ; especially when those cases are taken into the account where the effect does not follow immediately from its ultimate cause, and is only the mediate consequence of some subalternate one. Now “*Optima est lex, quæ minimum relinquit arbitrio judicis* :”<sup>1</sup> but the power of a tribunal, however nicely defined by rules of substantive law, would soon be found absolute in reality if no restraint were imposed on its discretion in declaring facts proved or disproved ; and we accordingly find that the laws of every well-governed state have established rules regulating the quality, and occasionally the quantity of the evidence necessary to form the basis of judicial decision. And here the analogy to the other branches of municipal law seems complete. The exclusion of evidence by virtue of a general rule may in particular instances exclude the truth, and so work injustice ; but the mischief is immeasurably compensated by the stability which the general operation of the rule

and great endowments of nature ; but his majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it, &c.”

<sup>1</sup> Bac. de Augm. Scient. lib. 8, c. 3, tit. 1, Aphorism. 46.

\*confers on the rights of men, and the feeling of security generated in their minds by the conviction that they can be divested of them only by the authority of law, and not at the pleasure of a tribunal. The two principal checks which the law of England imposes on its tribunals in this respect are, first, the prohibiting judges and jurymen from deciding *facts* on their own personal knowledge, and placing them as it were in a state of legal ignorance as to almost every thing relating to the matters in question except what is established before them by evidence.<sup>1</sup> Its maxim is, “Non refert quid notum sit judici, si notum non sit in formâ judicii:”<sup>2</sup> and the principles, “De non apparentibus et non existentibus eadem est ratio,”<sup>3</sup> “Idem est non esse et non apparere,”<sup>4</sup> “Quod non apparet non est,”<sup>5</sup> “Incerta pro nullis habentur,”<sup>6</sup> &c., so false in philosophy, become perfectly true in our jurisprudence. The second is, the exacting as a condition precedent even to the *reception* of evidence, that there be an open and visible connection between the principal and evidentiary facts, — “Nemo tenetur divinare”<sup>7</sup> — “Probationes debent esse evidentes, (id est)

<sup>1</sup> 7 H. IV. 41, pl. 5; Plowd. 83; 1 Leon. 161 See the authorities in the following notes; and *infra*, bk. 1, pt. 1. The canonists seem to have been somewhat loose in this respect. See Decret. Greg. IX. lib. 5, tit. 1, l. 9; Calvin, Lex Jurid. voc. “Notorium;” Gibert, Corpus Jur. Canon Proleg. Pars Post. tit. 7, cap. 2, § 2, N. ix., and Devotus, Inst. Jur. Can. lib. 3, tit. 14, § 10, not. 1.

<sup>2</sup> 3 Bulst. 115. “Nous ne poiomous pas aler a jugement sur notorie chose, eins selonque ce que le proces est devant nous mesmes.” Per Herle, C. J., H. 7 Edw. III. 4 A. pl. 7.

<sup>3</sup> 4 Co. 47 a; 5 Co. v. b.; 12 Id. 53, 134; 3 Bulst. 110; Hob. 295; 1 T. R. 404; 7 M. & W. 437; 10 Bingh. 47; 6 Bingh. N. C. 539; 7 M. & W. 437.

<sup>4</sup> Jenk. Cent. 5, Cas. 36.

<sup>5</sup> 2 Inst. 479.

<sup>6</sup> Davys, 33; Lofft, M. 555; Broom’s Max. xxvii. 3rd Ed.

<sup>7</sup> 4 Co. 28 a, and 66 b; 10 Co. 55 a. See also Bac. Max. sub reg. 3; Litt. R. 98; Lofft, M. 559.

perspicuæ et faciles intelligi.”<sup>1</sup> This indeed is only following out \*a great principle which runs through [\* 38] our whole law — “In jure non remota causa, sed proxima spectatur.”<sup>2</sup> One or two instances will illustrate. If things are traced up to their ultimate sources, the remote though *chief* cause of the appearance of a criminal at the bar might be found in his parents, his education, the example of others, the law itself, or even the very judge by whom he is tried; still the tribunal cannot enter upon such matters, and must only look at the *proximate* cause — his own act. So, the non-payment of a debt has for its proximate cause the debtor’s neglect, but the ultimate cause may be the default of others whose duty, either legally or morally, it was to have supplied him with money.

*Difference between public and domestic jurisdiction.*

§ 39. And here must be noticed a false principle which is to be found in some systems of jurisprudence, and runs through Bentham’s work on judicial evidence — viz., the assumption that there is a perfect, or even close analogy between justice administered by a parent in his family and justice administered by municipal tribunals between man and man. “Before states existed”<sup>3</sup> says the eminent writer just quoted, “at least in any of the forms now in existence in civilized nations, families existed. Justice is not less necessary to the existence of families than of states. The mode in which, in those domestic tribunals, created by nature at the

<sup>1</sup> Co. Litt. 283 a.

<sup>2</sup> Bac. Max. of the Law, Reg. 1; 12 East, 652; 14 M. & W. 483; 18 C. B. 379; 18 Jurist, 962; 6 B. & S. 881; H. & R. 61. See *infra*, bk. 1, pt. 1.

<sup>3</sup> 4 Benth. Jud. Ev. 7, 8.

instance of necessity, justice was administered, and, for that purpose, facts were inquired into, may for distinction's sake, be termed the *natural* or domestic mode of judicature. It is among the characteristics of the natural or domestic mode of judicature, to be exercised (if not absolutely, at least comparatively speaking) without forms: without rules. A man judges, as Monsieur \* Jourdan talked prose, unconscious of any science displayed, of any art exercised. One of your [\* 39] two sons leaves his task undone, and tears his brother's clothes: both brothers claim the same plaything: two of your servants dispute to whose place it belongs to do a given piece of work. You animadvert upon these delinquencies, you settle these disputes: it scarce occurs to you that the study in which you have been sitting to hear this, is a tribunal, a court; your elbow chair a bench; yourself a judge. Yet you could no more perform these several operations without performing the task of judicature, without exercising the functions of a judge, without hearing evidence, without making inquiry, than if the subject of inquiry had been the Hastings cause, the Douglas cause, or the Literary Property cause." From all this he draws the conclusion that courts of *summary* jurisdiction are courts of natural procedure,<sup>1</sup> and very superior both in theory and practice to the ordinary and regular tribunals. Under the former he reckons courts of request, courts of conscience, courts martial, and summary proceedings before justices of the peace, &c.; and not only lavishly praises them in many passages of his work on Judicial Evidence;<sup>2</sup> but in a work published

<sup>1</sup> 4 Benth. Jud. Ev. 8-12.

<sup>2</sup> See *inter al.*, vol. ii. pp. 28, 29; vol. iv. pp. 327, 352, 355, 356, 357, 405, 480, 481, 482, 487-489, 443, 628.

in 1790, when speaking of this country, assures the French nation, that "Imagination cannot conceive, nor heart desire, greater integrity than has been uniformly displayed for ages by courts composed of single judges, without juries, under the auspices of publicity, though in a state of dependence on the crown."<sup>1</sup>

§ 40. Now we have no wish to discuss the merits of these tribunals, further than to observe that courts of [\* 40] \* requests and courts of conscience have been superseded by a jurisdiction of a very superior kind, introduced by 9 & 10 Vict. c. 95; and that we really are not aware that courts martial, at least in general, are conducted *without forms*. But the fallacy of the reasoning on which the praise of summary tribunals is founded arises from losing sight of the great principle, that the essence of all rules of municipal law, adjective as well as substantive, consists in their *generality*. The observation is as old as the days of Aristotle, that a commonwealth is not to be confounded with a family, as though a large family were nothing different from a small commonwealth;<sup>2</sup> and a very little reflection will show the difference between them. The parent in his family administers a kind of *attributive* justice. Both by natural and municipal law he is invested with, comparatively speaking, an absolute power over his children: this is indispensably necessary to guide the conduct and form the characters of those in whom reason and experience are almost a blank; and the feeling of parental affection is so strong that this power may in general be safely in-

<sup>1</sup> Draft of a New Plan for the Organization of the Judicial Establishment in France, March, 1790, ch. 2, tit. 2, p. 7.

<sup>2</sup> Aristotle's Politics, bk. 1, ch. 1.

trusted to him. But the case is quite different with a sovereign, or judge, governing for the common welfare a set of beings of matured intellect like himself. A pure unlimited monarchy is unquestionably the natural and primitive form of government, but does it thence follow that it is the best at the present day, and that all others ought to be extirpated? On the other hand, how absurd would it be to argue that because a constitutional monarchy is an excellent form of government for a country, each private individual should establish one in his family! The very statement of these propositions is their refutation; and yet it is the same sort of reasoning which would infer that pre-established forms are useless in public judicial \* investigations, because they [\* 41] would be useless, or worse, in foro domestico.

2. *Necessity for the speedy action of tribunals — Interest reipublicæ ut sit finis litium.*

§ 41. Again; the duty of a judicial tribunal in dealing with facts is not limited to the abstract question of their existence; for whether materials for definite judgment or belief respecting it are forthcoming or not a *decision* must be given, to be followed by speedy, if not immediate action. Questions of philosophy, whether natural or moral, as well as questions of history, rest for the most part in speculation, and may be undertaken, dropped, and renewed at pleasure or convenience. Whether, for instance, the law of gravitation extends beyond the solar system; whether there is any determinate law of relation between the magnitudes of the planets and their distances from the sun; whether the motion of each of what are inaccurately termed fixed stars is independent or only forms part of some gigantic

system, are at present matters for investigation lying open to men in general: and the astronomer who considers that the materials before him are insufficient to warrant his forming a positive opinion on any of these subjects may suspend his judgment, in the hope that the observation of additional phenomena, or an improved analysis, or both combined, will disclose the truth to more fortunate generations. So, whether the army with which Xerxes invaded Greece consisted of thousands or millions of men; whether Cæsar was implicated in the Catalinarian conspiracy; whether King Richard III. murdered his nephews: and a host of such like, are questions the solution of which may be deferred, or even pronounced impossible, without in the least affecting the rights of individuals or the peace and good order of society. In the general course of every-day life, also, we are rarely compelled to *act* on mere conjectures, and commonly remain passive as long as possible in the hope of procuring satisfactory evidence to confirm or [\* 42] \*dissipate them. But *judicial* inquiries differ widely from all these. "*Interest (or "expedit") reipublicæ ut sit finis litium:*"<sup>1</sup> "*Ne lites immortales essent dum litigantes mortales sunt.*"<sup>2</sup> The plaintiff and defendant stand before the tribunal, and both individual and social interests require from it a decision, and that too a speedy decision, one way or the other. It will not do for the judge to say, "This matter seems doubtful, I suspend my judgment," and dismiss it; to be renewed indefinitely from time to time; keeping alive all the annoyance and irritation of a lawsuit; holding out to each

<sup>1</sup> 4 Blackst. Com. 338; Co. Litt. 103 a, 303 b; 6 Co. 9 a, and 45 a; 11 Id. 69 a; 8 H. & N. 647.

<sup>2</sup> Voet. ad Pand. lib. 5, tit. 1, n. 53; 17 C. B. 140, per Willes, J



of the parties a manifest temptation to fabricate evidence in order to turn the scale in his favor; and injuring the community by distracting the attention of at least two of its members from the exercise of more useful avocations. All this, however, is very different from adjourning a court for a definite time, for the purposes of justice.<sup>1</sup>

*Rules for the disposal of matters of fact necessary to tribunals — Rules regulating the burden of proof — Legal presumptions.*

§ 42. The duty of the legislator, therefore, is not discharged by framing substantive laws and establishing forms of judicial procedure; in order to do complete justice he must go farther, and supply rules for the guidance of tribunals in the *disposal* of all matters of fact which come before them, whatever the nature of the inquiry, or however difficult or even impossible it may be to get at the real truth. In such straights, barbarism and ignorance either decide at haphazard in each particular instance, or dogmatically lay down unbending rules to be applied in all cases, or invoke the aid of superstition — sometimes, as in the trials by ordeal which have prevailed both in the ancient and modern world, and in the judicial combats of the middle ages, audaciously and impiously calling on Heaven to vindicate \* the injured party by a miracle; and at others, as [\* 43] in the old system of canonical purgation and the wager of law of our ancestors, unwarrantably assuming that the truth will be extracted by the oath of the party

<sup>1</sup> 17 & 18 Vict. c. 125, s. 19.

who is most strongly interested in its concealment.<sup>1</sup> On the other hand, the laws of countries where the true [\* 44] principles \* of jurisprudence are understood meet the difficulty by establishing rules to regulate the burden of proof; or, most usually, to speak with strict accuracy, by attaching an artificial weight to the natural principles by which the burden of proof is governed. This has been well explained by a foreign jurist, in lan-

<sup>1</sup> A very good account of these is given by Bonnier, in his *Traité des Preuves*, §§ 745-750, 2nd Ed. See also 4 Blackst. Comm. ch. 27; Devotus, Inst. Jur. Can. Lib. 3, tit. 9, § 26, not. (3), and § 30, in notis, and Gibbon's *Decline and Fall of the Roman Empire*, ch. 38. Besides the absurdity and impiety of these presumptuous appeals to miraculous interposition, there can be little doubt that the danger of them was often evaded by management, so as to be more apparent than real. The following curious instance of this, taken from an ancient ecclesiastical authority, is given in the *Law Magazine*, N. S. vol. i. p. 8. After a long dispute between a Catholic deacon and an Arian, on the merits of their respective creeds, the Catholic says, "*Quid longis sermocinationum intentionibus fatigamur? Factis rei veritas adprobetur. Succendatur igni æneus et in ferventi aquâ annulus cujusdam projiciatur; qui vero eum ex ferventi undâ sustulerit, ille justitiam consequi comprobatur, quo facto pars diversa ad cognitionem hujus justitiæ convertatur.*" The Arian agrees. "*Circa horam tertiam in foro conveniunt, concurrunt populus ad spectaculum, accenditur ignis, æneus superponitur, fervet valde, annulus in undâ ferventi projicitur.*" The Catholic invites the Arian to plunge his arm first into the seething water; the latter declines the first trial, urging the Catholic, as the challenger, to begin. The Catholic bares his arm, but the Arian beholding it smeared with oil exclaims that a fraud is intended, on which Jacinthus, another Catholic deacon, happening accidentally (of course) to pass that way, inquires into the cause of strife. The issue is thus related. "*Nec moratus, extracto a vestimentis brachio in æneum dexteram mergit. Annulus enim, que ejectus fuerat, erat valde levis ac parvulus, nec minus ferebatur ab undâ quam vento possit ferri vel palea. Quem diu multumque quæsitum, infra unius horæ spatium reperit. Accendebatur interea vehementer focus ille sub dosio, quo validius fervens non facile adsequi possit annulus a manu quærentis, extractumque tandem nihil sensit diaconus in carne suâ, sed potius protestatur in imo quidem frigidum esse æneum, in summitate vero calorem teporis modici continentem. Quod cernens hæreticus, valde confusus, injectâ audax manum in æneo, dicens: præstabit mihi hæc fides mea. Injectâ manu, protinus usque ad ipsa ossium internodia omnis caro liquefacta defluxit; et sic altercatio finem fecit.*"

guage of which the following is a translation.<sup>1</sup> "The determining to what extent a certain known element renders probable the existence of such or such an unknown cause, governed, as it necessarily is, by the light of reason, in general depends wholly on the discrimination of the judge. But in the most important cases the law, desirous of insuring the stability of certain positions, and of cutting short certain controversies, has established PRESUMPTIONS, to which the judge is obliged to conform." And in another place,<sup>2</sup> "It is not always \*possible for man to arrive at a perfect knowledge of the truth in each particular case, and yet social [\* 45] necessities do not always allow him to suspend his judgment and refrain. The stability of the state of person and property, in a word, the want of peace and security

<sup>1</sup> Bonnier, *Traité des Preuves*, § 710, 2nd ed. We subjoin the original. "La question de savoir jusqu'à quel point tel élément connu rend vraisemblable l'existence de telle ou telle cause inconnue, subordonnée par sa nature aux lumières de la raison, dépend en général uniquement de l'appréciation du juge. Mais, dans les cas les plus importants, la loi, voulant assurer la stabilité de certaines positions, et couper court à certaines controverses, a établi des présomptions auxquelles le juge est obligé de se conformer."

<sup>2</sup> Id. §§ 733, 734, 2nd Ed. "Il n'est pas toujours possible à l'homme d'arriver à la connaissance parfaite de la vérité dans chaque cas particulier, et cependant les nécessités sociales ne lui permettent pas toujours de suspendre son jugement et de s'abstenir. La stabilité de l'état des personnes, celles des propriétés, enfin le besoin de calme et de sécurité pour une foule d'intérêts précieux, obligent le législateur à tenir pour vrais un grand nombre de points, qui ne sont pas démontrés, mais dont l'existence est établie par une induction plus ou moins puissante. L'ordre politique, comme l'ordre social, ne repose que sur des présomptions légales. L'aptitude à exercer certains droits, à remplir certaines fonctions, ne se reconnaît qu'au moyen de certaines conditions déterminées *à priori*, une vérification spéciale pour chaque individu étant évidemment impraticable. Plus les relations sociales se compliquent, plus il devient nécessaire de multiplier ces présomptions. \* \* \* Les motifs qui ont déterminé le législateur à établir telle ou telle présomption, tiennent le plus souvent au droit bien plus qu'au fait. Ce qu'il examine surtout, ce n'est pas si le fait connu réunit tous les caractères suffisants pour rendre probable le fait inconnu, mais seulement si l'intérêt social exige que l'on conclue de la constatation de l'un à l'existence de l'autre."

for a multitude of precious interests, compel the legislator to hold as true a great number of points which are not demonstrated, but whose existence is established by an induction more or less cogent. Political order, like social order, rests only on legal presumptions. The capacity of exercising certain rights, discharging certain functions, can be recognized only through the medium of certain conditions determined *à priori*, a *special verification for each individual instance being evidently impracticable*. The more social relations become complicated, the more it becomes necessary to multiply these presumptions. \* \* \* The motives which have induced the legislator to establish such or such a presumption much more frequently belong to law than to fact. What he chiefly considers is, not whether the known fact combines all the characteristics requisite to render the unknown fact probable, but solely whether social interest requires that from the proof of the one the existence of the other ought to be inferred." And an eminent judge of our own observed in one case,<sup>1</sup> "The laws of evidence as to what is receivable or not, are founded on a compound consideration of what abstractedly considered is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute if all matters which could by possibility affect it were severally gone into; and inquiries \*carried on from

[\*46] month to month as to the truth of every thing connected with it. I do not say how that would be, but such a course is found to be impossible at present."

<sup>1</sup> Rolfe, B., in *The Attorney-General v. Hitchcock*, T., 10 Vict 11 Jurist, 478, 482.

*Different kinds of presumptions.*

§ 43. These *legal* presumptions<sup>1</sup> are of two kinds. In most of them the law assumes the existence of something until it is disproved by evidence, called by the civilians *præsumptiones juris*, or *præsumptiones juris tantum*; and likewise, by English lawyers, inconclusive or rebuttable presumptions. In others, although these are much fewer in number, the presumption is absolute and conclusive, so that no counter-evidence will be received to displace it. These are called *præsumptiones juris et de jure* — a species of presumption correctly defined, “*Dispositio legis aliquid præsumendis, et super præsumpto, tanquam sibi comperto, statuentis.*”<sup>2</sup> To this class belong the contract to pay which the law implies from the purchase of goods; the intent to kill or do grievous bodily harm implied from the administration of poison, using deadly weapons, &c. Some may be considered as belonging to universal jurisprudence; the principal of which are the presumption of right derived from the continued and peaceable possession of property, and the presumption upholding the decisions of courts of competent jurisdiction. We have already alluded to the maxim “*Interest reipublicæ ut sit finis litium* ;”<sup>3</sup> to which must be added, “*Vigilantibus et non dormientibus jura subveniunt*,”<sup>4</sup> and “*Ex diuturnitate temporis omnia præsumuntur solenniter esse acta.*”<sup>5</sup> If undisturbed possession for a

<sup>1</sup> There are presumptions of *fact* as well as presumptions of *law*. See, *suprà*, Part 1, §§ 7 and 27, and, *infra*, bk. 3, pt. 2, ch. 2.

<sup>2</sup> Alciatus de Præsumptionibus, pars. 2, n. 3; Menochius de Præsumptionibus, lib. 1, Quæst. 3, n. 17; 1 Ev. Poth. § 807.

<sup>3</sup> *Suprà*, § 41.

<sup>4</sup> 2 Co. 26 b; 4 Id. 10 b; 82 b; Hob. 347; 2 B. & P. 412; 5 C. B. 74.

<sup>5</sup> Co. Litt. 6 b; Jenk. Cent. 1, Cas. 91.

[\*47] \*very long time had not a conclusive effect, the most valuable rights would not only be made the continual subject of dispute, but be liable to be divested or overthrown when the original evidences of the title to them become lost or decayed by time;<sup>1</sup> and accordingly, among the various ways in which property may be acquired, we find both writers on natural law and the positive codes of nations recognizing that of "prescription," *i. e.*, uninterrupted user or possession for a period longer or shorter.<sup>2</sup>

§ 44. So, it would be productive of the greatest inconvenience and mischief if after a cause, civil or criminal, has been solemnly determined by a court of competent and final jurisdiction, the parties could renew the controversy at pleasure, on the ground either of alleged error in the decision, or the real or pretended discovery of fresh arguments or better evidence. The slightest reflection will show that if *some* point were not established at which judicial proceedings must stop, no one could ever feel secure in the enjoyment of his life, liberty or property; while unjust, obstinate and quarrelsome persons, especially such as are possessed of wealth or power, would have society at their mercy, and soon convert it into one vast scene of litigation, disturbance and

<sup>1</sup> "If time," says Lord Plunket, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the lawgiver has placed an hourglass, by which he metes out incessantly those portions of duration which render needless the evidence that he has swept away."—*Lord Brougham's Historical Sketches of Statesmen, &c.*, vol. 2, p. 39, note. — *Life of C. J. Bushe*.

<sup>2</sup> Grotius de Jur. Bell. ac Pac. lib. 2, c. 4; Pufendorf, Jus Nat. et Gent. lib. 4, c. 12; Dig. lib. 41, tit. 3; Cod. lib. 7, tit. 38; 2 Blackst. Comm. ch. 17; Co. Litt. 113, 114; 1 Greenl. Ev. § 17, 7th Ed.; Grand Coustumier de Normandie, ch. 125; Poth. Obl. part. 3, ch. 8; Cod. Civil. liv. 3, tit. 20.

ill will. The great principle of the *finality* of judicial \*decision is universally recognized, and has been expressed in the various forms — “*Res judi- [\* 48] cata pro veritate accipitur;*”<sup>1</sup> “*Judicium pro veritate accipitur;*”<sup>2</sup> “*Interest reipublicæ res judicatas non rescindi;*”<sup>3</sup> “*Præsumitur pro justitiâ sententiæ;*”<sup>4</sup> “*Sententia facit jus;*”<sup>5</sup> “*Infinitum in jure reprobat;*”<sup>6</sup> “*Nemo debet pro una causâ bis vexari;*”<sup>7</sup> &c.

§ 45. We will merely add one other instance, which places this matter in the strongest light. If the abstract question were proposed, “What is the most *unjust* thing that could be done?” the answer probably would be, “The punishing a man for disobeying a law with the existence of which he was not acquainted.” And yet that must constantly occur everywhere; there being no rule of jurisprudence more universal than this, that every person in a country must be conclusively presumed to know its laws sufficiently to be able to regulate his conduct by them,<sup>8</sup> — “*Ignorantia juris, quod quisque tenetur scire, neminem excusat.*”<sup>9</sup> Hard as this may seem, it is indispensably necessary in order to

<sup>1</sup> Dig. lib. 50, tit. 17, l. 207; Mascard. de Prob. Concl. 1237, n. 13; 1 Ev. Poth. part. 4, ch. 3, sect. 3, art. 3, § 37; Co. Litt. 103 a; and 186 a; n. (3), by Hargr.

<sup>2</sup> Co. Litt. 39 a, 168 a, 236 b; 2 Inst. 380.

<sup>3</sup> 2 Inst. 360.

<sup>4</sup> Mascard. de Prob. Concl. 1237, n. 2. See 3 Bulst. 42, 43.

<sup>5</sup> Ellesm. Postn. 55.

<sup>6</sup> 2 Inst. 340; 6 Co. 45 a; 8 Id. 168 b; 12 Co. 24; Hob. 159; Jenk Cent. 2, Cas. 15; Cent. 4, Cas. 2 and 46; and Cent. 8, Cas. 29.

<sup>7</sup> Jenk. Cent. 1, Cas. 38; 5 Co. 61 a.

<sup>8</sup> Dig. lib. 22, tit. 6, l. 9; Heinec. ad Pand. Pars 4, § 146; Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. R. 13; Doctor and Student, Dial. 1, c. 26; Dial. 2, cc. 16, 46; Plowd. 342, 343; 1 Co. 177 b; 2 Co. 3 b; 6 Co. 54 a; 1 Hale; P. C. 42; 7 Car. & P. 456.

<sup>9</sup> 4 Blackst. C. 27.

prevent infinitely greater evils; for the allowing violations of the criminal or contraventions of the civil code to pass without punishment or inconvenience, under the plea of ignorance of their provisions, would render [\* 49] <sup>\*the whole body of jurisprudence practically</sup> worthless. If none were amenable to the laws but those who could be proved acquainted with them, not only would ignorance be continually pleaded, in criminal cases especially, but persons would naturally avoid acquiring a knowledge which carried such perilous consequences along with it.

*Abuse of artificial presumptions.*

§ 46. But if artificial presumptions have their use, they have likewise their abuse. In unenlightened times, or in the hands of a corrupt tribunal, they are most dangerous instruments; and even in the best times, and by the best tribunals, require to be handled with discretion. Some very absurd and mischievous presumptions of this kind are to be found in the works of the civilians,<sup>1</sup> as well as in the laws of modern France;<sup>2</sup> and in this country juries have been frequently advised, if not directed, by judges to presume the grossest absurdities under color of advancing justice.<sup>3</sup> A well-known instance of an extremely violent and harsh presumption is to be found in the statute 21 Jac. 1, c. 27; by which it was enacted, that every woman delivered of bastard issue, who should endeavor privately, either by drowning or

<sup>1</sup> See Struvius, *Syntagma Juris Civilis*, by Müller, Exercit. 28, § xviii., note (5). "Idem dico," says Bartolus, "si aliquis deprehenditur in domo aliqujus, ubi pulchra mulier est, certè facit hunc adulterium manifestum:" Comment. in 2dam part. Dig. Nov. 111 b, Edit. Lugd. 1581.

<sup>2</sup> See Bonnier, *Traité des Preuves*, § 752, *et seq.* 2nd Ed.

<sup>3</sup> See *infra*, bk. 3, pt. 2, ch. 2.



secret burying, or in any other way, to conceal the death thereof, so that it might not come to light whether it were born alive or not, should be deemed to have murdered it, unless she proved it to have been born dead. This cruel enactment, which seems to have been copied from an edict of Hen. II. of France in 1556,<sup>1</sup> the principle of which is also to be \*found in the laws of some other countries,<sup>2</sup> has been repealed by the [\* 50] 43 Geo. 3, c. 58, s. 3. The conclusive effect formerly ascribed to the confessions of accused persons,<sup>3</sup> and to attempts by flight to escape judicial inquiry,<sup>4</sup> are likewise among the most general instances.

*Evidence excluded on the grounds of vexation, expense and delay.*

§ 47. There are some exclusionary rules connected with this branch of the subject, the absolute necessity for which it would require extreme hardihood to deny. We mean where evidence is excluded on the ground that its production would cause needless vexation, expense or delay.<sup>5</sup> In illustration of the two former, the following case has been put.<sup>6</sup> "By laying a barrow full of rubbish on a spot on which it ought not to have been laid (the side of a turnpike road), Titius has incurred a penalty of 5s. No man was witness to the transaction but Sempronius; and in the station of

<sup>1</sup> Domat, Lois Civiles, part 1, liv. 3, tit. 6; Préambule, note (a); and Id. sect. 4, § 2, note (b).

<sup>2</sup> 4 Blackst. Comm. 198.

<sup>3</sup> See bk. 3, pt. 2, c. 7.

<sup>4</sup> See bk. 3, pt. 2, c. 2.

<sup>5</sup> Bentham, whose work on Judicial Evidence is a professed attack on artificial systems of proof in general, admits that the most legitimate evidence may be rightly rejected on these grounds, even at the risk of doing injustice. See vol. i. p. 31; vol. iv. p. 115; and bk. 9, pt. 2, cc. 1, 2, 3, 4.

<sup>6</sup> 4 Benth. Jud. Ev. 479, 480.

writer, Sempronius is gone to make his fortune in the East Indies. Should Sempronius be forced, if he could be forced, to come back from the East Indies for the chance of subjecting Titius to this penalty? Who would think of subjecting Sempronius to the vexation? Who would think of subjecting Sempronius, or anybody else, to the expense?" Again, while the liberty of adducing evidence to support his cause ought to be most freely conceded to every litigant—" *Facultas probationum non est angustanda*"<sup>1</sup>—that liberty might be so grossly abused as to stop the administration of justice; and a power in all tribunals to restrain it within due bounds

[\* 51] \*is consequently as essential to the proper discharge of their functions as the right of expunging surplusage in forensic documents, and restraining prolixity in pleading. " *Excessus in re qualibet jure reprobatum communi.*"<sup>2</sup> Suppose a man sued for a debt, or an injurious act of the simplest and most ordinary kind, were to pretend that he required for his defense the evidence of some hundreds of witnesses living in remote and different parts of the world, a court is surely not bound to take his word or his oath for the truth of this, or even for his bona fides in asserting it. Accordingly in the judicial practice of this country a commission or mandamus to examine witnesses will be refused, or terms will be imposed on the party making the application, if the judges think, in their discretion, that the application for it is made with a view to vexation or delay, or with any other sinister or improper motive.<sup>3</sup> So, we apprehend, a

<sup>1</sup> 4 Inst. 279. See also Cod. lib. i. tit. 5, l. 21, vers. fin.

<sup>2</sup> 2 Inst. 232 and 107; 11 Co. 44.

<sup>3</sup> *Pirie v. Iron*, 8 Bingh. 143; *Brydges v. Fisher*, 4 M. & Scott, 458; *Sparkes v. Barrett*, 5 Scott, 402; *De Rossi v. Polhill*, 7 Scott, 836; *Dalton v. Lloyd*, 1 Gale, 102; *Summers v. Rawson*, 3 Jur. 288; *Castelli v. Groom*, 16 Jur. 888, &c.

power (to be exercised with great caution no doubt) is vested in every tribunal of refusing to hear evidence obviously tendered for such purposes.<sup>1</sup> “*Quanquam*,” says the Digest,<sup>2</sup> “*quibusdam legibus amplissimus numerus testium definitus sit: tamen ex constitutionibus Principum hæc licentia ad sufficientem numerum testium coarctetur, ut iudices moderentur, et eum solum \*nume- rum testium, quem necessarium esse putaverint, [\* 52] evocari patiantur; ne effrenatâ potestate ad vexandos homines superflua multitudo testium prorahatur.*” Still in all these cases the evidence offered might really be relevant and important, and injustice done by its rejection.

§ 48. The lawgivers of some countries, sensible of the evils that may be occasioned by malpractices like the above, have, in endeavoring to suppress them, run into positive absurdity. We allude to the practice of limiting by law the number of witnesses that may be called in proof of each fact in dispute;<sup>3</sup> without regard to the nature of the cause, the probity of the witnesses, the quantity of evidence given by them, or their manner of

<sup>1</sup> In the Irish State Trials of 1843, the defendants were indicted for a seditious conspiracy, and among the overt acts were laid the holding in different parts of that kingdom what were called “monster meetings,” i. e., meetings at each of which several hundreds of thousands of persons were present. In order to prevent the case ever getting to the jury, it was, as we are informed, suggested to the defendants, that under pretense of showing that those meetings were not of a seditious character, they might call as witnesses every one of the persons present at them. This dishonorable mode of defense was not resorted to; but suppose it had been, must the court and jury have submitted to it?

<sup>2</sup> Dig. lib. 22, tit. 5, l. 1, § 2.

<sup>3</sup> 5 Benth. Jud. Ev. 521; Domat, Lois Civiles, part 1, liv. 3, tit. 6, sect. 3, § xvi. Note (x), vers. fin.; Devot. Inst. Canon. lib. 3, tit. 9, § 9; Decretal. Greg. IX. lib. 2, tit. 20, c. 37. “To any given fact or question *fait* (fact), French; *pregunta* (question), Spanish, thirty witnesses were and are allowed by Spanish law; ten only are, or at least were, allowed in French law. Are both right? One French witness, then, is equal to three Spanish ones.” Benth. in loc. cit.

delivering their testimony—things which it would obviously be impossible to define by any rule laid down beforehand.

*In framing rules of judicial proof the consequences of decisions must be looked to.*

§ 49. Another marked feature by which judicial proof is distinguished from other forms of proof is, that the legislator by whom its rules are framed must look beyond the contending parties in each case, and weigh the consequences to society which may follow from the decisions of tribunals. Thus the mischiefs which arise from a blameable passiveness in the law are not usually so great as those which spring from its misguided action. For instance, the condemnation and punishment of an innocent man for a supposed crime and the acquittal of a guilty one are, philosophically speaking, only modes of misdecision, diverging equally from the [\* 53] \*truth. But a very little reflection will show that, taken with their consequences, the former is an incalculably greater evil: and the legislators and jurists of almost every age and country have recognized the principle—however violated in practice—that, although the punishment of guilt and the protection of innocence have in general an equal claim in the administration of justice, the latter should be the primary care of the law, and consequently that in matters of doubt it is safer to acquit [\* 54] than condemn.<sup>1</sup> Again, the laws of every \*country suppress much evidence that would be relevant or

<sup>1</sup> See the following authorities, the number of which might be almost indefinitely increased: Deut. xvii. 4, 6; Dig. lib. 48, tit. 19, l. 5; Cod. lib. 4, tit. 19, l. 25; Grotius, Jus Bell. ac. Pac. lib. 2, cap. 23, § v, n. 1; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. N. 4 & 16; Voet. ad Pand. lib. 23, tit. 3, N. 18; Matth. de Prob. cap. 2, n. 20; Mascard de Prob. Concl. 36, 496, 497; Sanchez

even conclusive, where its reception would involve  
 \* the disclosure of matters of paramount import-  
 ance which public policy and social order re- [\* 55]

de Matrimonio, lib. 10, Disput. 12, N. N. 40, 41; Mirror of Justices, ch. 5, sect. 1; Abus, 108, N. 15; T. 18 Ed. II. 620, Nota 1; Fortesc. de Laud. cap. 27; 3 Inst. 210; 2 Hale, P. C. 289, 290; 4 Blackst. Com. 358; 1 Stark. Ev. 559, 573, 574, 588, 3rd Ed.; Mac Nally's Evid. 578, 580; Burnett's Crim. Law of Scotland, 522, 523; Dickson, Ev. in Scot. 162, 163; 1 Greenl. Ev. §§ 13 a and 34, 7th Ed.; Burrill, Circ. Ev. 58, 59; D'Aguesseau, "Fragment sur les Preuves en matière Criminelle;" Beccaria, Dei Delitti e delle Pene, § 7. To these may be added even the Chinese Law, if we may rely on a work entitled "The Chinese," by J. F. Davis, vol. 1, p. 394, A. D. 1836, comprised in "The Library of Entertaining Knowledge." It is worthy of observation that although, as appears from some of the above references, the principle in question was fully recognized by the civilians and canonists, they reversed the rule in those cases where innocence chiefly requires protection; and their maxim, "In atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi:" Beccaria, Dei Delitti e delle Pene, § 8, in not.; see, also, Mascard. de Prob. Concl. 1392, N. 13; Burnett's Crim. Law of Scotland, 612 — will remain a lasting monument of the barbarity as well as the imbecility of its framers. Nor are these merely the notions of bye-gone ages. In a very recent treatise on the canon law is the following passage: "Plus præstant præsumptiones in causis civilibus, quam in criminalibus, in quibus nemo ex solis conjecturis, etiam vehementibus, condemnandus est; excepto crimine hæreseos, cujus suspectus tanquam hæreticus condemnatur, nisi omnem suspicionem excusserit:" Devotus, Instit. Canon. vol. 2, p. 116, Paris. 1852. Superiorum facultate. The English law goes farther in the opposite direction than that of most other countries, for it lays down as a maxim that it is better several guilty persons should escape than that one innocent person should suffer; 2 Hale, P. C. 289; 4 Blackst. Com. 358; the salutary fruit of which is, that in no part of the world is genuine voluntary evidence against suspected criminals more easily procured than in England; the persuasion being general throughout society that if a suspected man be really innocent, the law will take care that no harm shall happen to him. The principles on which this noble and politic maxim rests are not, however, generally understood. The strongest proof of this is to be found in the singular fact of its having been formally attacked by the celebrated Dr. Paley, in his "Moral and Political Philosophy," bk. 6, ch. 9, who designates it a popular maxim having a considerable influence in producing injudicious acquittals, and argues thus against it. "The security of civil life, which is essential to the value and the enjoyment of every blessing it contains, and the interruption of which is followed by universal misery and confusion is protected chiefly by the dread of punishment. The misfortune of an individual, for such may the sufferings, or even the death, of an innocent person be called, when they are occasioned by no evil intention, cannot be placed in

[\* 56] quire to be \* concealed ; such as secrets of state, communications made in professional confidence, and others.<sup>1</sup>

<sup>1</sup> See *infra*, bk. 3, pt. 2, ch. 8.

competition with this object. \* \* \* When certain rules of adjudication must be pursued, when certain degrees of credibility must be accepted, in order to reach the crimes with which the public are infested ; Courts of justice should not be deterred from the application of these rules by *every* suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect that he who falls by a mistaken sentence, may be considered as falling for his country ; whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upheld." It will not, however, be difficult to expose the fallacy of this pernicious and inhuman argument. It is perfectly true that the security of civil life is the first object of all penal laws, and that that security is chiefly protected by the dread of punishment ; but then it is of punishment as a *consequence of guilt*, and not of punishment falling indiscriminately on those who have or have not provoked it by their crimes. When the guilty escape, the law has merely failed of its intended effect ; but when the innocent become its victims, it injures the very persons it was meant to protect, and destroys the security it was meant to preserve. Nor is this all, or even the worst ; for it is a great mistake to suppose that the actual wrong and violence done to the innocent man are the *only* evils resulting from an erroneous conviction. Confidence in the administration of justice must necessarily be shaken when people reflect, and can truly reflect, that every individual they see condemned to punishment may be in the highest degree unfortunate and in no degree guilty, his sufferings being inflicted merely as a sacrifice to a supposed expediency. Under such a system, few would care to prosecute for offenses, still fewer to come forward with voluntary testimony against persons accused or suspected of them. The law might, indeed, sit in terrific majesty, denouncing the severest penalties, and acting on the most sanguinary and strained maxims, but for want of proofs and co-operation on the part of society, those penalties would soon become a dead letter. It requires strong imaginative powers to see an analogy between the fate of a soldier dying in the defense of his country and that of an innocent citizen butchered in cold blood under the name of justice. The one falls with honor, his memory is respected, his family, perhaps, provided for ; while the latter has not even the sad consolation of being pitied, but sees himself branded with public ignominy, leaves a name which will excite nothing but horror or detestation ; until perhaps, in course of time, his innocence becomes manifest. only to awake in all the rightminded portion of the community a feeling of alarm and disgust at the state of insecurity under which they live. "Could the escape of ten of the most desperate criminals," emphatically asks Sir Samuel Romilly, in his "Observations on the Criminal Law of England, &c. Note

*Difference between the securities for legal and historical truth.*

§ 50. Another great difference between legal and historical evidence lies in the securities for truth, and the sources of danger and deception peculiar to each. Posterity and future ages are not unfrequently spoken of as a tribunal, to whose judgment appeals may be made from the decisions of the present; and viewed as a figure of speech there is no impropriety in this. But figures must not be mistaken for facts. The tribunal of posterity differs immensely from all others: for it is one of unlimited jurisdiction, both judicial and inquisitorial; it is ever sitting, ever investigating, ever judging; barred by no prescription, bound by no estoppel, and responsible to no human authority. The securities for the truth of the records and traditions of

(D.," from which some of the preceding remarks have been taken, "have ever produced as much mischief to society as did the public executions of Calas, of D'Anglade, or of Le Brun?"—three celebrated cases which occurred in France, and show the fearful state into which the administration of justice had fallen under the *ancien régime* in that country. But another evil, which seems to have altogether escaped the notice of Dr. Paley, remains to be mentioned. "Instances," observes Sir Samuel Romilly, "have indeed occurred like that of Calas, where a man has been offered up as a sacrifice to the laws, though the laws had never been violated; where the tribunals have committed the double mistake of supposing a crime where none had been committed, and of finding a criminal where none could exist. These, however, are very gross, and therefore very rare examples of judicial error. In most cases the crime is ascertained, and to discover the author is all that remains for investigation; and, in every such case, if there follow an erroneous conviction, a twofold evil must be incurred, *the escape of the guilty, as well as the suffering of the innocent*. Perhaps amidst the crowd of those who are gazing upon the supposed criminal, when he is led out to execution, may be lurking the real murderer, who, while he contemplates the fate of the wretch before him, reflects with scorn upon the imbecility of the law, and becomes more hardened, and derives more confidence in the dangerous career on which he has entered." See further on this subject, *infra*, bk. 1, pt. 1.

the past which time has brought down to us consist in the multitude of sources to which they can be traced, the large number of persons whose interest it has been to preserve them from oblivion and corruption: above all, the *permanent effects* of events; visible in the shape of monuments and other pieces of real evidence,<sup>1</sup> [\* 57] \*customs, ceremonies, and the like; and, finally, the actors in the scene having passed away, there is rarely either opportunity or interest to fabricate evidence in furtherance of their views or justification of their conduct. Now in the case of a legal investigation before a judicial tribunal, properly so called, all this is reversed. The judge or jury, as the case may be, must decide once for all on such evidence as may come before them; the facts — the *res gestæ* of the dispute — are known but to few, and are matter of interest to fewer; while the parties who are best acquainted with the truth stand in a hostile position to each other, and have a stake at issue which places them under the strongest temptation to misrepresent it. Hence it is obvious that without peculiar guarantees for the veracity and completeness of the evidence adduced in courts of justice, they would, when investigating disputed facts, be exposed to the same risks of error as the historian without the safeguards which he possesses — in a word, the legislator dealing with judicial

<sup>1</sup> The following passage is taken from a review in the *Examiner* newspaper of Laing's "Descriptive Catalogue of Impressions from ancient Scottish Seals," December 28th, 1850. "Seals and coins may be considered as bottles filled with memoranda and cast upon the ocean of time by the earlier mariners, for the use of those who came after them. Their forts, their factories, their light-houses, have many of them disappeared; but the bottles are perpetually being found after many days. \* \* \* Many an obscure allusion in ancient authors has been illuminated by the pure ray serene emitted by a graven gem. The scholar will often find sermons in these stones, excelling the lucubrations of the commentators no less in clearness than in terseness; and he may sometimes be put right by a scarabæus, when a scholiast has failed him."



evidence is bound to frame characteristic securities to meet characteristic dangers.

§ 51. This distinction between historical and legal proof may be illustrated by the consideration of derivative, or second-hand, evidence. The infirmity of this kind of proof has been already pointed out,<sup>1</sup> and indeed is one of those self-evident things to which the mind of man at once assents. It is equally clear, that the farther evidence is removed from its primary source the weaker it becomes; thus hearsay evidence becomes more suspicious and dangerous according as it is reported at second, third, fourth or fifth hand. And yet, in inquiring into the events of past ages it is scarcely possible to move a step without resorting to \*this kind of evidence. Suppose the events, sacred and profane, which took place in the first [\* 58] year of the Christian era, existed solely in oral tradition, and taking a generation to last thirty years, the account which persons at the commencement of the present century had of those events seems to have come to them by hearsay at the *sixtieth* hand; evidence, the value of which in a court of justice would be rightly estimated at zero, if not below it. And although accounts of many of those events having been committed to writing affords a better security for their truth, still the genuineness of the documents in which they are recorded rests, in part at least, on oral tradition. But it is a great mistake to suppose that the real probative force of the evidence of those facts which we possess in the present century rises no higher than this reasoning would indicate. The fallacy consists in treating each generation as *one* single person by whom

<sup>1</sup> *Suprà*, Part 1, § 30.

a bare relation of the fact has been handed down to the next, and not as consisting of a number of persons interested in ascertaining its truth, besides wholly overlooking the corroborative proofs supplied by permanent memorials and the acts of men. In short, as a modern historian has well expressed it,<sup>1</sup> "The presumption of history, to whose mirror the scattered rays of moral evidence converge, may be irresistible, when the legal inference from insulated actions is not only technically, but substantially, inconclusive."

§ 52. The offering to prove a historical fact by derivative evidence affords, therefore, not the slightest presumption of unfairness; unless when the evidence is on its face a substitute for some other which might have been procured.<sup>2</sup> But derivative evidence offered in [\* 59] <sup>a</sup> court of justice in proof of *recent* events, by a litigant party whose avowed object is to obtain a decision in his own favor, carries so strong an appearance of fraud that the laws of most nations either reject or look upon it with suspicion.<sup>3</sup> The English law in general rejects it; but reverses the rule in many cases where the matter to be proved has taken place so long ago that, the original evidence is manifestly unattainable, and thus far partakes of the nature of a historical fact.<sup>4</sup>

<sup>1</sup> Hallam's Constitutional History of England, vol. 2, p. 106, 7th Ed.

<sup>2</sup> Gibbon, who was not a lawyer, thus expresses himself in the Preface to the fourth volume of his History of the Decline and Fall of the Roman Empire: "I have always endeavored to draw from the fountain head; my curiosity, as well as a sense of duty, has always urged me to study the originals; and if they have sometimes eluded my search, I have carefully marked the *secondary* evidence, on whose faith a passage or a fact were reduced to depend."

<sup>3</sup> *Infrà*, bk. 1, pt. 2; and bk. 3, pt. 2, ch. 4.

<sup>4</sup> *Infrà*, bk. 3, pt. 2, ch. 4. "Witnesses are either ancient or modern, that is, contemporary. \* \* \* Ancient witnesses consist of the poets and other

*Mistakes from confounding legal with philosophical and historical evidence.*

§ 53. The greatest misconceptions and errors have arisen from confounding legal with philosophical and historical evidence. There is a well-known anecdote of Sir Walter Raleigh, which will serve to illustrate this. While a prisoner in the Tower, composing his *History of the World*, a disturbance arose under his window, and unable to ascertain its merits through the conflicting accounts which reached him, he is said to have uttered an exclamation against the folly of relying on narrations of the events of past ages, when there is so much difficulty in arriving at the truth of those happening \*immediately around us.' But in that investigation he [\* 60] was discharging a quasi judicial function, without the compulsory powers possessed by courts of justice for extracting truth, and laboring under the further disadvantage of imprisonment; while in dealing with the events of past ages he had the benefit of the securities for historical truth already described.<sup>2</sup> Much also of Professor Greenleaf's "*Examination of the Testimony of the Four Evangelists by the Rules of Evidence administered in Courts of Justice*" is founded on the same mistake. Nowhere, however, are the consequences of

celebrated writers, whose authority for certain facts or opinions are embodied in their immortal works. Thus the Athenians produced the testimony of Homer for their right of dominion over the isle of Salamis, in opposition to the pretensions of the commonwealth of Megara; and in a recent transaction the citizens of Tenedos pleaded the authority of Periander, the wise Corinthian, in a dispute with the inhabitants of Sigeum concerning their common boundaries, &c. \* \* \* *These bear evidence of the past, &c.*" — Aristotle's *Rhetoric*, bk. 1, ch. 15, as freely translated by Gillies.

<sup>1</sup> Barrow's *History of Ireland*, vol. 1, pp. 25, 26.

<sup>2</sup> *Suprà*, §§ 50, 51.

confounding the two kinds of evidence so visible as in Bentham's work on Judicial Evidence. He entertains the most erroneous notions as to the nature and use of the rules which regulate the burden of proof;<sup>1</sup> and seems to consider every issue raised in a court of justice as a philosophical question, the actual truth of which is to be ascertained by the tribunal at any cost; or should this be impracticable, then that a decision is to be given founded on the best guess that can be made at it. Thus, speaking of the laws which require a plurality of witnesses in certain cases, he says,<sup>2</sup> "Every man is excluded, every man, be he who he may, unless he comes with another in his hand. Two propositions are here assumed: all men are liars, and all judges fools. Without the second, the first would be insufficient." The illogical character of this reasoning is obvious at a glance. What the law says in such cases is this—the witness *may* be a liar, and the judge *may* be a fool; and the mischief which might be caused by the folly of the one set in motion by the mendacity of the other would so greatly exceed any advantage that could result from a decision based on their united veracity and wisdom, that for the benefit of the community we arrest the [\* 61] \*inquiry. Perhaps, however, the most glaring instance of this error is where he contends with so much earnestness and vehemence that confidential communications between clients and their legal advisers ought not to be held sacred by law;—an argument founded on the assumption that the compelling their disclosure would advance the ends of justice, by depriving evil-disposed persons of professional assistance in carrying out unright-

<sup>1</sup> See 1 Benth. Jud. Ev. 36.

<sup>2</sup> 4 Benth. Jud. Ev. 503. See also 5 Id. 463, 464

eous plans' — we say “unrighteous,” for to projected violations of the *law* no professional adviser is expected, or ought for one moment, to render himself party. If, indeed, the existing rule were *suddenly* altered, and every thing *hitherto* communicated in professional confidence, under the assurance that it would be kept inviolate, laid open to the view of the courts, much valuable evidence would doubtlessly be obtained ; but the first harvest of this kind would be the last, for in future no such communications would be made, either by honest or dishonest clients. It is difficult to paint in too strong colors the evils of such a state of things. For want of materials on which to form a judgment, legal advice would become of little worth ; and for want of materials to prepare it, cross-examination, the most powerful instrument for the extraction of truth, would be converted into a lifeless form. Besides, it is a great mistake to suppose that a man's case must necessarily be bad as a whole because there is some weak point in it. Nor is this all. A professional adviser often cannot discharge his functions with effect unless informed respecting matters connected with, though not constituting, the subject of inquiry ; the public disclosure of which might be so injurious, that the client would sooner abandon his action or defense than even run the risk of such a calamity by having his counsel or attorney subpcenaed as a witness against him.

*Principal securities for the truth of legal evidence.*

\*§ 54. The securities which have been devised by municipal law for insuring the veracity and completeness of the evidence given in courts of justice vary, as might be expected, in different countries, and with the

<sup>1</sup> Benth. Jud. Ev. bk. 9, pt. 4, ch. 5, sect. 2.

systems of law to which they are attached. Several of those principally relied on by the English law; such as the publicity of judicial proceedings, the compulsory presence of witnesses in open court, the right of cross-examination, &c., will be considered in their place:<sup>1</sup> for the present, we will merely point attention to a few which, either from their value or general adoption, deserve particular notice.

*Political or legal sanction of truth.*

§ 55. To the three sanctions of truth which have been described in the preceding part of this Introduction,<sup>2</sup> the municipal laws of most nations have added a fourth; which may be called the *legal*, or *political* sanction,<sup>3</sup> and consists in rendering false testimony an offense cognizable by penal justice. The punishment of this offense has varied in different ages and places: in England, it is a misdemeanor; punishable by fine, imprisonment or penal servitude.<sup>4</sup>

*Oaths.*

§ 56. The next security is a very remarkable one; and consists in requiring all evidence in courts of justice to be given *on oath*—according to the maxim “*In judicio non creditur nisi juratis.*”<sup>5</sup> Oaths, however, it is well known, are not peculiar to courts of justice, nor are they even the creatures of municipal law—having been in use before societies were formed or cities built; and the most solemn acts of political and social life being guarded by their sanction. — “*Non est arctius*

<sup>1</sup> *Infra*, bk. 1, pt. 1.

<sup>2</sup> *Supra*, pt. 1, §§ 16 *et seq.*

<sup>3</sup> 1 Benth. Jud. Ev. 198, 221.

<sup>4</sup> *Infra*, bk. 3, pt. 2, ch. 10.

<sup>5</sup> Cro. Car. 64. See, also, 3 Inst. 79.

vinculum inter homines quàm jusjurandum.”<sup>1</sup> And \*however abused or perverted by ignorance and superstition, an oath has in every age been found [\* 63] to supply the strongest hold on the consciences of men, either as a pledge of future conduct or as a guarantee for the veracity of narration.

§ 57. An oath is an application of the religious sanction, “*Jurare est Deum in testem vocare, et est actus divini cultus.*” It is calling the Deity to witness in aid of a declaration by man ;<sup>2</sup> and consequently does not depend for its validity on the *peculiar* religious opinions of the person by whom it is taken. The Roman Emperor, we are told, “*jurejurando quod propriâ superstitione juratum est, standum rescripsit* :<sup>3</sup> and Lord Chief Justice Willes, in his celebrated judgment in *Omychund v. Barker*,<sup>4</sup> expresses himself as follows : “Oaths were instituted long before Christianity, were made use of to the same purposes as now, were always held in the highest veneration, and are almost as old as the creation. ‘*Juramentum nihil aliud est quam Deum in testem vocare* ;’ and therefore nothing but the belief of a God, and that he will reward and punish us according to our deserts, is

<sup>1</sup> Jenk. Cent. 3, Cas. 54.

<sup>2</sup> 3 Inst. 165. In the laws of some countries witnesses were required to give their evidence *fasting*. Devot. Inst. Canon. lib. 3, tit. 9, § 12, not. (1).

<sup>3</sup> “Le serment est l’attestation de la Divinité à l’appui d’une déclaration de l’homme. Ce témoignage de la croyance des peuples à une justice suprême se retrouve dans tous les pays et dans tous les temps. Pythagore prétendait même que le monde devait son origine à un serment que Dieu lui-même aurait prêté de toute éternité, et dont la création serait l’accomplissement. On sent bien que cette explication, comme la plupart de celles que donne la philosophie sur le mystérieux problème de l’origine du monde, est plus obscure que le fait même à expliquer.” — *Bonnier, Traité des Preuves*, § 340, 2nd Ed.

<sup>4</sup> Dig. lib. 12, tit. 2, l. 5, § 1.

<sup>5</sup> Willes, 545, *et seq.* The case is also reported, 1 Atk. 49, nom. *Omychund v. Barker*.

necessary to qualify a man to take an oath. We read of them, therefore, in the most early times. If we look into the Sacred history, we have an \*account in Genesis, [\* 64] ch. 26, v. 28 & 31, and again Gen. ch. 31, v. 53, that the contracts between Isaac and Abimelech, and between Jacob and Laban, were confirmed by mutual oaths; and yet the contracting parties were of very different religions, and swore in a different form.” (The Lord Chief Justice, after citing several passages and examples, both from the Old and New Testament, as well as the ancient heathen poets and authors, together with some modern authorities, and, among others, Grotius, *De Jure Belli ac Pacis*, lib. 2, c. 13, sect. 1,<sup>1</sup> in support of this position, proceeds thus): “The forms indeed of an oath have been always different in all countries, according to the different laws, religion, and constitution of those countries. But still the substance is the same, which is, that God in all of them is called upon as a witness to the truth of what we say. Grotius, in the same chapter, sect. 10, says, *forma jurisjurandi verbis differt, re convenit*. There are several very different forms of oaths mentioned in Selden, vol. ii. p. 1470; <sup>2</sup> but whatever the forms are, he says, that is meant only to call God to witness to the truth of what is sworn. ‘*Sit Deus testis,*’ ‘*Sit Deus vindeax,*’ or ‘*Ita te Deus adjuvet,*’ are expressions promiscuously made use of in Christian countries; and in ours that oath hath been frequently varied; as ‘*Ita te Deus adjuvet, tactis sacrosanctis Dei evangelis;*’ — ‘*Ita, &c., et sacrosancta Dei evangelia;*’ — ‘*Ita, &c., et omnes sancti.*’ And now we keep only these words in the oath, ‘So help you God;’ and which indeed are the only material

<sup>1</sup> See, also, Pufendorf, *Jus Nat. et Gent.* lib. 4, c. 2, § 2.

<sup>2</sup> Selden's Works by Wilkins, in six volumes, A. D. 1726.



words, and which any heathen who believes a God may take as well as a Christian. The kissing the book here, and the touching the Bramin's hand and foot at Calcutta, and many other different forms which are made use of in different countries, are no part of the oath, but are only ceremonies invented to add the greater solemnity \* to the taking of it, and to express the assent of the party to the oath when he does not repeat the [\* 65] oath itself; but the swearing in all of them, be the external form what it will, is calling God Almighty to be a witness."

§ 58. There is this important distinction among oaths: that many, besides invoking the attestation of a Superior Power, place in the mouth of the swearer a formula by which he imprecates divine vengeance on himself if his testimony be untrue. One of the forms in use among the ancient Romans is thus described: "*Lapidem silicem tenebant juraturi per Jovem, hæc verba dicentes, 'Si sciens fallo, tum me Diespiter salvâ urbe arceque bonis ejiciat, ut ego hunc lapidem;'*"<sup>1</sup> and formerly an imprecation formed part of the judicial oath in France.<sup>2</sup> Some eminent authorities in our own law have used language calculated to convey the notion that oaths are necessarily imprecatory. Thus in Queen Caroline's case,<sup>3</sup> Lord Chief Justice Abbott, when delivering the answer of the judges to a question put by the House of Lords, says, "Speaking for myself, not meaning, thereby, to pledge the other judges, though

<sup>1</sup> Festus, de Verbor. Signif. lib. 10, voc. "Lapidem;" and the custom is alluded to by Cicero, Epist. ad Divers. lib. 7, epist. 1; and by Aulus Gellius, Noct. Attic. lib. 1, c. 21. See also 1 Greenl. Ev. § 328, note, 7th Ed.

<sup>2</sup> Bonnier, Traité des Preuves, § 352, 2nd Ed.

<sup>3</sup> 2 Brod. & B. 285.

I believe their sentiments concur with my own, I conceive, that, if a witness says he considers the oath as binding upon his conscience, he does, in effect, affirm, that in taking that oath, he has called his God to witness that what he shall say will be the truth, and that he has imprecated the divine vengeance upon his head, if what he shall afterward say is false." In *Rea v. White*,<sup>1</sup> also, the court said, "An oath is a religious asseveration, by which a person renounces the mercy, [\* 66] \*and imprecates the vengeance of heaven, if he do not speak the truth." Imprecation is however no part of the essence of an oath; but is a mere adjunct, of questionable propriety, as calculated to divert attention from the true meaning of the ceremony and fix it on some external observance. "An oath," says Pufendorf,<sup>2</sup> "is a religious asseveration, by which we renounce the divine mercy, or invoke the divine vengeance upon us, unless we speak the truth. That this is the meaning of oaths is apparent from the forms in which they are usually couched, as, for instance, 'So help me God,' 'God be my witness,' 'God be my avenger,' or equivalent expressions which amount to nearly the same thing. For when we call to witness a superior who has a right to inflict punishment on us, we by the act desire of him to avenge perfidy; and the Being who knows all things is the avenger of crime by the being witness to it. Now

<sup>1</sup> 1 Leach, C. L. 430.

<sup>2</sup> De Jur. Nat. et Gent. lib. 4, c. 2, § 2. "Est autem jusjurandum assertio religiosa, quâ divinæ misericordiæ renunciamus, aut divinam pœnam in nos deposcimus, nisi verum dicamus. Hunc enim juramentorum sensum esse, facile indicant formulæ, quibus illa concipi solent; puta, *Ita me Deus adjuvet*, *Deus sit testis*, *Deus sit vindex*, aut his æquipollentes; quæ eodem ferè recidunt. Quando enim superior puniendi jus habens testis advocatur, simul ab eodem perfidiæ ultio petitur; et qui novit omnia ultor est, quia testis. In hoc ipso autem gravissima pœna est, si quem Deus propitius mortalem non adjuvet."

the loss of the favor of God is in itself an extremely severe punishment." A modern canonist defines an oath "*Affirmatio religiosa, hoc est, advocatio Divini Numinis in testem ejus rei, quæ promittitur aut asseritur;*"<sup>1</sup> and the Roman law truly laid down "*Jurisjurandi contempta religio satis Deum ultorem habet.*"<sup>2</sup>

§ 59. The utility of oaths in any shape has been strongly questioned.<sup>3</sup> The good man, it is sometimes \*said, will speak the truth without an oath, [\* 67] while the bad man mocks at its obligation. To this, however, the following answer has been given: "It must be owned great numbers will certainly speak truth, without an oath; and too many will not speak it with one. But the generality of mankind are of a middle sort; neither so virtuous as to be safely trusted, in cases of importance, on their bare word; nor yet so abandoned, as to violate a more solemn engagement. Accordingly we find by experience, that many will boldly say, what they will by no means adventure to swear: and the difference, which they make between these two things, is often indeed much greater, than they should; but still it shows the need of insisting on the strongest security. When once men are under that awful tie, and, as the Scripture phrase is, have bound their souls with a bond (Numb. xxx. 2), it composes their passions, counterbalances their prejudices and interests, makes them mindful of what they promise, and careful what they assert; puts them upon exactness in every circumstance: and circumstances are often very material things. Even the good

<sup>1</sup> Devot. Inst. Canon. lib. 3, tit. 9, § 23.

<sup>2</sup> Cod. lib. 4, tit. 1, l. 2.

<sup>3</sup> Benth. Jud. Ev. bk. 2, ch. 6.

<sup>4</sup> Archbishop Secker, as cited in Ram on Facts, 211, 212.

might be too negligent, and the bad would frequently have no concern at all, about their words, if it were not for the solemnity of this religious act." The chief arguments brought against oaths, however, are founded on their abuses. One of the greatest of these is *the investing oaths with a conclusive effect*—where the law announces to a person whose life, liberty, or property is in jeopardy, that in order to save it he has only to swear to a certain indicated fact. This was precisely the case of the wager of law anciently used in England,<sup>1</sup> and the system of purgation under the canon law.<sup>2</sup> So, in the civil law, either of the litigant parties might in many [\* 68] cases tender \*an oath, called the "decisory oath," to the other; who was bound under peril of losing his cause, either to take it, in which case he obtained judgment without further trouble, or refer it back to his adversary, who then refused it at the like peril or took it with the like prospect of advantage. The judge also (be it remembered there was no jury) had a discretionary power of deciding doubtful cases by means of another oath, called the "suppletory oath," administered by him to either of the parties.<sup>3</sup> With reference to these, one of the greatest foreign authorities, who to the learning of a jurist added the practical experience of a judge, expressed himself as follows:<sup>4</sup> "I would advise the judges to

<sup>1</sup> 3 Blackst. Comm. 341.

<sup>2</sup> Devot. Inst. Canon. lib. 3, tit. 9, § 26, not. 3; 4 Blackst. Comm. 363.

<sup>3</sup> See on the subject of these oaths, Dig. lib. 12, tit. 2; Cod. lib. 1, tit. 1; Domat, Lois Civiles, part. 1, liv. 3, tit. 6, § 6; 1 Ev. Poth. Oblig. part. 4, ch. 3, sect. 4; Bonnier, Traité des Preuves, §§ 338–378, 2nd Ed., Calvin, Lexic. Jurid. voc. "Juramentum," et "Jurisjur. Usus;" Devot. Inst. Canon. lib. 3, tit. 9, §§ 23 *et seq.*

<sup>4</sup> 1 Ev. Poth. § 831. With the exception of those cases in which a defendant was allowed to wager his law, abolished by 3 & 4 Will. 4, c. 42, the common law of England, as is well known, always rejected the decisory and sup-

be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted." Another great abuse of oaths is their *\*frequency*. Formerly a system of wholesale swearing pervaded every part of the administration of this country—it was observed, "a pound of tea cannot travel regularly from the ship to the consumer without costing half a dozen oaths at the least;"<sup>1</sup> and nothing was more common than for persons to go before magistrates and take voluntary oaths on the most trivial occasions. The latter are now prohibited altogether,<sup>2</sup> and by several modern statutes a declaration has been substituted for an oath in many proceedings of an extrajudicial nature.

*Establishment of forms for pre-appointed evidence.*

§ 60. Another security for the truth of evidence, and check on the action of fraud and perjury, consists in the establishment by law of prescribed forms to be observed

pletory oaths of the civilians. In France the *decisory* oath is not allowed in criminal cases; Bonnier, *Traité des Preuves*, § 342, 2nd Ed., who says, § 360, that its use in such cases may be considered as having completely disappeared among modern nations. Both in France and by the modern canon law, the *suppletory* oath is confined to civil cases: *Id.* § 378, and *Devot. Inst. Canon.* lib. 3, tit. 9, § 26.

<sup>1</sup> Paley's *Moral and Political Philosophy*, bk. 3, pt. 1, ch. 16.

<sup>2</sup> 5 & 6 Will. 4, c. 62, s. 13.

when *pre-appointed* evidence is employed. Of these the principal and most universal is that derived from the use of *writing*. The superiority in permanence, and in many respects in trustworthiness, of written over verbal proofs must have been noticed from the earliest times — “*vox audita perit; litera scripta manet.*” The false relations of what never took place; and even in the case of real transactions the decayed memories, the imperfect recollections and willful misrepresentations of witnesses; added to the certainty of the extinction, sooner or later, of the primary source of evidence by their death; all show the wisdom of providing some better, or at least more lasting, mode of proof for matters which are susceptible of it, and are in themselves of sufficient consequence to overbalance the trouble and expense of its attainment. *La force des preuves par écrit*,” says Domat,<sup>1</sup> “*consiste en ce que les hommes sont convenus de conserver par l’écriture le souvenir des choses qui se sont passées, et dont ils ont* [\* 70] *\*voulu faire subsister la mémoire, soit pour s’en faire des règles, ou pour y avoir une preuve perpétuelle de la vérité de ce qu’on écrit. Ainsi, on écrit les Conventions pour conserver la mémoire de ce qu’on s’est prescrit en contractant, et pour se faire une loi fixe et immuable de ce qui a été convenu. Ainsi, on écrit les Testamens, pour faire subsister le souvenir de ce qu’a ordonné celui qui avait le droit de disposer de ses biens, et en faire une règle à son héritier et à ses légataires. Ainsi, on écrit les Sentences, les Arrêts, les Edits, les Ordonnances, et tout ce qui doit tenir lieu de titre ou de loi. Ainsi, on écrit dans les Registres publics les Mariages, les Baptêmes, les actes qui doivent être insinués; et on fait*

<sup>1</sup> Domat, *Lois Civiles*, part. 1, liv. 3, tit. 6, sect. 2. See *infra*, bk. 2, pt. 3, ch. 1.

*d'autres semblables registres pour avoir un dépôt public et perpétuel de la vérité des actes qu'on y enregistre. \* \**

*\* L'écrit conserve invariablement ce qu'on y confie, et il exprime l'intention des personnes par leur propre témoignage."* In accordance with these principles, the policy of the common law of England requires that the proceedings of parliament and the higher courts of justice, and some other public matters of great weight and importance, shall be preserved in written records; and that many acts, even among private individuals, must only be done by deed or writing. Large additions have been made in modern times; especially by the institution of public registers for marriages, births, and deaths, &c.; and by the celebrated statute 29 Car. 2, c. 3, commonly called "The Statute of Frauds and Perjuries." Its principal provisions are the prohibiting all parol leases for more than three years, &c.:<sup>1</sup> and that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or \*to charge any person upon any agreement made [\* 71] upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."<sup>2</sup> The construction

<sup>1</sup> Sects. 1 and 2.

<sup>2</sup> Sect. 4.

put on this section<sup>1</sup> has been altered by the 19 & 20 Vict. c. 97, s. 3. The 29 Car. 2, c. 3, likewise enacts,<sup>2</sup> that “no contract for the sale of any goods, wares or merchandises, for the price of 10*l.* sterling, or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.” In many cases also certain forms are super-added to writing. Thus, it is of the essence of a *deed* that it be sealed and delivered:<sup>3</sup> and by the 7 Will. 4 & 1 Vict. c. 26, s. 9 (explained by 15 & 16 Vict. c. 24), a will must be in writing, and executed by being signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and subscribe the will in the presence of the testator, &c. It must not be supposed that this is peculiar to our law.

[\* 72] \*The Jews, the Romans, and the Anglo-Saxons had, and most modern nations have, their pre-appointed evidence;—requiring certain acts to be done by writing, or in some particular way. See a variety of instances collected in Greenleaf’s *Law of Evidence*, vol. 1, § 262, note (1), 7th edit.; and for the French law, see Bonnier, *Traité des Preuves*, part. 2, liv. 2, 2nd Ed.

<sup>1</sup> See the cases collected, 1 Smith, *Lead. Cas.* 275, 6th Ed.

<sup>2</sup> Sect. 16 (marked 17 in the ordinary copies).

<sup>3</sup> 2 Blackst. *Comm.* 305, 306; Finch, *Com. Laws*, 24 a.



§ 61. As a general rule, when the law prescribes forms for pre-appointed evidence the non-compliance with them is fatal to the transaction, and the whole becomes a nullity. “Non observatâ formâ infertur adnullatio actûs.”<sup>1</sup> “Forma legalis, forma essentialis.”<sup>2</sup> “Solemnitates legis sunt observandæ.”<sup>3</sup> Bentham recommends that this should be reversed, and that pointed suspicion, not nullification, should be the result;<sup>4</sup> but he admits that nullification is just in certain cases.<sup>5</sup> It is impossible to deny that the principle under consideration may be, and often has been, extended beyond the limits alike of usefulness and propriety; and the truth and good sense of the entire matter seem contained in the following observations of Sir W. D. Evans:° “The interest of society is greatly promoted, by establishing authentic criteria of judicial certainty, so far as this object can be effectuated without materially interfering with the claims of general convenience. Where the acts which may become the subject of examination will admit of deliberate preparation, and the purposes of them evince the propriety of a formal memorial of their occurrence, more especially when they are from their nature subject to error and misrepresentation, it is reasonable to expect that those \*who are interested in their preservation should provide for it in a manner previously regulated [\* 73] and established, or that, in case of neglect, their particular interest should be deemed subordinate to the great

<sup>1</sup> 5 Co. iv. a; 12 Co. 7. The same holds in the French law. See Bonnier, *Traité des Preuves*, § 418, 2nd Ed.; Domat, part. 1, liv. 3, tit. 6, s. 2, § vi.

<sup>2</sup> 10 Co. 100 a.

<sup>3</sup> Jenk. Cent. 1, Cas. 22, and Cent. 3, Cas. 45.

<sup>4</sup> 2 Benth. Jud. Ev. 467, 487, 518.

<sup>5</sup> Id. 470.

<sup>6</sup> 2 Ev. Poth. 142.

purposes of general certainty. But it is also certain that this system of precaution may be carried too far, by the exaction of formalities, cumbersome and inconvenient to the general intercourse of civil transactions; the special application of these principles must be chiefly governed by municipal regulations: but as a general observation, it is evident that the great excellence of any particular system must consist in requiring as much certainty and regularity as is consistent with general convenience, and in admitting as much latitude to private convenience as is consistent with general certainty and regularity. It may be added, that for these purposes every regulation should be attended with the most indisputable perspicuity; and that the established forms should be cautiously preserved from any intricacy or strictness, that may tend to perplex and embarrass the subjects which they were designed to elucidate, and to endanger and destroy the substance, which they were instituted to defend."

*Rejection of the testimony of suspected persons — Policy of this.*

§ 62. Another plan, resorted to by the laws of most nations for guarding against misdecision, consists in the repudiation as witnesses of persons whose testimony, either from personal interest in the matter in dispute or other visible cause, seems likely to prove untrustworthy. This is the *recusatio testis* of the civilians, as distinguished from the *recusatio judicis*, or challenge of the judge, and in our law is called "The Incompetency of Witnesses." Its policy, however, has been seriously doubted, even fiercely attacked, in modern times, and much has been

said and written on both sides of the question.<sup>1</sup> Perhaps the true view of this matter is that the \*principle of repudiation should, at least in general, be confined to *pre-appointed* evidence. There is a great difference between the rejection of *evidence* and the rejection of *witnesses*. Evidence may fairly be rejected when so remote that to allow tribunals to act on it would invest them with dangerous or unconstitutional power; or, when, being derivative instead of original, its very production carries the impress of fraudulent suppression of better; or, when its disclosure might endanger the public safety. But the testimony of *casual* witnesses to a fact, *i. e.*, persons who have incidentally witnessed it; and this is often an act unforeseen except by the doer, who may be deeply interested in its concealment; comes under none of these heads. Such witnesses are the original depositories of the evidence; what they have been heard to say out of court would be open to the same objections as their testimony in it, aggravated by the disadvantage of being produced *obstetricante manu*; and in many cases the excluding their testimony would be to exclude all attainable evidence on the question in dispute, and offer by impunity a premium to dishonesty, fraud and crime. If it be said that owing to personal interest in the matter in question, unsoundness of mind, deficiency of religion, antecedent misconduct, &c., their evidence is likely to prove unsafe; the answer is, that any line drawn on this subject must necessarily be in the highest degree arbitrary. It is impossible to enumerate *à priori* the causes which may distort or bias the minds of men to mis-state or pervert

<sup>1</sup> See Benth. Jud. Ev. vol. i. pp. 3, 151, 152; vol. ii. pp. 541, 542, 543, and bk. 9, pt. 3; Tayl. Ev. § 1210 *et seq.*, 5th Ed.; Ph. & Am. Ev. 43-45; Bonnier, Traité des Preuves, §§ 225 *et seq.*, 275 *et seq.*, 2nd Ed.

the truth, or to estimate the weight of each of these causes in each individual case or with each particular person. But it is very different with *pre-appointed* evidence, where parties have the power to select their witnesses, and thus make the original depositories of [\* 75] \* the evidence to their acts. To such parties the law may fairly say, "You shall for this purpose select persons who from their station, occupation, or habits are likely to be of more than ordinary intelligence, knowledge, or trustworthiness: if you do not, you must take the consequences." All this seems a natural and just development of the great principle,—in the English law a fundamental one,—that requires the *best evidence* to be given, and is further recommended by being rarely productive of injury or inconvenience.<sup>1</sup>

*Enormous abuses of it.*

§ 63. But whatever the real value of this plan for securing the trustworthiness of evidence, its abuses have been enormous. In the civil and canon laws the list of persons liable to be rejected as incompetent to bear testimony was so large that, if the rules of exclusion had not been qualified or evaded, it is difficult to see how, even with the interrogation of parties and the perilous aid of the decisory and suppletory oaths, justice could have been administered at all.<sup>2</sup> And these very qualifications and evasions gave rise to a still

<sup>1</sup> See on this subject, bk. 1, pt. 1, and bk. 3, pt. 2.

<sup>2</sup> See Dig. lib. 22, tit. 5; Cod. lib. 4, tit. 20; Huberus, Præl. Jur. Civ. lib. 22, tit. 5; Heinec. ad Pand. par. 4, §§ 136-140; Devot. Inst. Canon. lib. 3, tit. 9, §§ 13 *et seq.*, 5th Ed.; Decret. Greg. IX. lib. 2, tit. 20. Bonnier, in his *Traité des Preuves*, §§ 225 *et seq.*, considers that the positive rejection of witnesses was rare in the ancient Roman law, and that the complicated system established in Europe was chiefly the work of the middle ages.

greater evil, which shall be noticed presently.<sup>1</sup> In some instances entire classes were rejected, not from any distrust of their veracity, but as a punishment for offenses, or with the view of affixing a stigma on religious or political opinions. The strongest illustration of this is to be found in the celebrated constitution of the Greek emperor: by which Pagans, Manichæans, and members of some other sects, were disqualified \* from giving evidence under any circumstances; while heretics and Jews were only allowed to do so [\* 76] in causes in which heretics or Jews were parties, and, except in some peculiar cases from necessity, could not bear testimony against orthodox Christians.<sup>2</sup> Similar principles prevailed in the canon law,<sup>3</sup> which also, as might have been expected, rejected the evidence of excommunicated persons, at least when tendered against

<sup>1</sup> See *infra*, § 74.

<sup>2</sup> Cod. lib. 1, tit. 5, l. 21. We subjoin this constitution entire. "Quoniam multi iudices in dirimendis litigiis nos interpellaverunt, nostro indigentes oraculo, ut eis referetur quid de testibus hæreticis statuendum sit, utrumne accipiantur eorum testimonia, an respuantur, sancimus, contra orthodoxos quidem litigantes nemini hæretico, vel his etiam qui Judaicam superstitionem colunt, esse in testimonia communionem: sive utraque pars orthodoxa sit, sive altera. Inter se autem hæreticis, vel Judæis, ubi litigandum existimaverint, concedimus fœdus permixtum, et dignos litigatoribus etiam testes introducere: exceptis scilicet his, quos vel Manichaicus furor (cujus partem et Borboritas esse manifestum est), vel Pagana superstitio detinet: Samaritis nihilominus, et qui illis non absimiles sunt, Montanistis, et Tascodrogitis, et Ophitis; quibus pro reatus similitudine omnis legitimus actus interdictus est. Sed his quidem, id est, Manichæis, Borboritis, et Paganis, necnon Samaritis, et Montanistis, et Tascodrogitis, et Ophitis omne testimonium, sicut et alias legitimas conversationes sancimus esse interdictum. Aliis vero hæreticis tantummodo judicialia testimonia contra orthodoxos, secundum quod constitutum est, volumus esse inhibita. Cæterum testamentaria testimonia eorum, et quæ in ultimis elogiis, vel in contractibus consistunt, propter utilitatem necessarij usus, eis sine ulla distinctione permittimus, ne probationum facultas, angustetur."

<sup>3</sup> Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 19; Ayl. Par. Jur. Can. Angl. 448; Devot. Inst. Canon. lib. 3, tit. 9, § 13.

such as were orthodox.<sup>1</sup> Even whole races and nations have occasionally been brought within the pale of exclusion; as in some parts of the West Indies,<sup>2</sup> and some of the United States of America,<sup>3</sup> where the evidence of a negro slave was not receivable against a free person; and in India, where that of a Hindoo [\* 77] \*seems not to have been receivable against a Mohammedan.<sup>4</sup> The following law of the State of Alabama, passed so late as 1852, carried the matter much farther: "Negroes, mulattoes, Indians, *and* all persons of mixed blood, descended from negro or Indian ancestors, to the third generation included, though one ancestor of each generation may have been a white *person*, whether bond or free, cannot be a witness in any cause, civil or criminal, except for or against each other."<sup>5</sup> Although the English law never went so far in this respect as those of most other countries, yet even among us the number of grounds of incompetency to give evidence was formerly very considerable. They have been much reduced in modern times by the decisions of the judges and the interference of the legislature.<sup>6</sup>

§ 64. One of the strangest and most absurd applications of this principle was the rejecting, or at least regarding with suspicion, the testimony of *women* as compared with that of *men*. The following law is attributed to

<sup>1</sup> Lancel. *in loc. cit.*

<sup>2</sup> Browne's Civil Law, vol. i. p. 107, note, 2nd Ed.; Shephard's Colonial Practice of St. Vincent, 69, 70.

<sup>3</sup> Appleton on Evidence, App. 271, 275, 276, 277, 278.

<sup>4</sup> See Arbuthnot's Reports of the Foujdaree Udalt, p. 1, and Preface, p. xxiii; Goodeve, Evid. 113.

<sup>5</sup> Appleton, Evid., App. 275, 276.

<sup>6</sup> On the subject of the incompetency of witnesses, see bk. 1, pt. 2, and bk. 2, pt. 1, ch. 2.

Moses by Josephus: "Let the testimony of women not be received, on account of the levity and audacity of their sex;"<sup>1</sup>—a law which looks apocryphal,<sup>2</sup> but which even if genuine could not have been of universal application.<sup>3</sup> The Hindu code, it appears, \*rejected their evidence generally, if not absolutely;<sup>4</sup> as [\* 78] likewise did the Mohammedan law on charges of adultery, and in some other instances.<sup>5</sup> Nor were these merely Asiatic views. The law of ancient Rome, while admitting their testimony in general, refused it in certain cases.<sup>6</sup> The civil and canon laws of mediæval Europe seem to have carried the exclusion much farther.<sup>7</sup> Mascardus<sup>8</sup> says, "*Feminis plerumque omninò non creditur, ob id duntaxat, quod sunt femine, quæ ut plurimum solent esse*

<sup>1</sup> Joseph. Antiq. Judaic. lib. 4, c. 8, No. 15. *Γυναικῶν δὲ μὴ ἔστω μαρτυρία, διὰ κηφόρητα καὶ θράσος τοῦ γένους αὐτῶν.*

<sup>2</sup> Independent of the inspiration of the Pentateuch and its significant silence on the subject, the style of this law is widely different from that of Moses.

<sup>3</sup> There is at least one instance in the Pentateuch where the evidence of a woman was receivable, and this even in a *capital* case: "If a man have a stubborn and rebellious son, which will not obey the voice of his father, or the voice of his mother, and that, when they have chastened him, will not hearken unto them: then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; and they shall say unto the elders of his city, This our son is stubborn and rebellious, he will not obey our voice; he is a glutton and a drunkard. And all the men of his city shall stone him with stones, that he die: so shalt thou put evil away from among you; and all Israel shall hear, and fear." Deut. xxi. 18–21. Solomon, also, in his celebrated judgment, 1 Kings, iii. 16 *et seq.*, seems to have made no difficulty about receiving the statements of the two women.

<sup>4</sup> See translation of Pootee, ch. 3, s. 8, in Halhed's Code of Gentoo Laws, and Goodeve, Evid. 87.

<sup>5</sup> See Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50; Hamilton's Translation of Hedâya, vol. 1. p. 382; Macnaghten's Moohammedan Law, 77; and Arbuthnot's Reports of the Foujdaree Udalt, p. 3.

<sup>6</sup> Dig. lib. 22, tit. 5, l. 18.

<sup>7</sup> Mascard. de Prob. Concl. 763–765; Lancel. Inst. Jur. Can. lib. 3, tit. 14, §§ 14 and 15; Decret. Gratian. Pars 2, Causa 33, Quæst. 5, c. 17. See, also, Heinec. ad Pand. Pars 4, § 127 (2).

<sup>8</sup> Mascardus de Prob. Concl. 763, NN. 2, 3.

*fraudulentæ, fallaces, et dolosæ;*" and Lancelottus, in his *Institutiones Juris Canonici*,<sup>1</sup> lays down in the most distinct terms that women cannot in general be witnesses, citing the language of Virgil, "*Varium et mutabile semper femina*,"<sup>2</sup>—not the only instance in which poetry has been invoked to justify maxims and laws indefensible by reason. That these rules were plastic enough, like the other rules of those systems, so as to admit many exceptions, may easily be conceived;<sup>3</sup> but the following extract, from the work of an able French jurist of our [\* 79] \*time, shows how long the principle held its ground on the continent.<sup>4</sup> "After women had been admitted to bear testimony by an ordinance of Charles VI." (of France) "of the 15th Nov. 1394, it was long before their evidence was considered equivalent to that of a man. Bruneau, although a contemporary of Mde. de Sévigné, did not scruple to write, in 1686, that the deposition of three women was only equal to that of two men. At Berne, so late as 1821; in the Canton of Vaud, so late as 1824, the testimony of two women was required to counterbalance that of one man. We will say nothing of the minor distinctions with which the system was complicated, such, for instance, as the principle that a virgin was entitled to a greater credit than a widow—*magis creditur virgini quàm viduæ*." In the edition of the *Institutiones Canonice* of Devotus,<sup>5</sup> published at Paris in 1852, it is distinctly stated that, except in a few peculiar instances, women are not competent witnesses in criminal cases. In Scotland, also, until the beginning of

<sup>1</sup> Lib. 3, tit. 14, §§ 14 and 15.

<sup>2</sup> *Æn.* 4, 569, 570.

<sup>3</sup> See Mascard. *in loc. cit.*

<sup>4</sup> Bonnier, *Traité des Preuves*, § 243, 2nd Ed.

<sup>5</sup> Lib. 3, tit. 9, § 14.



the 18th century, sex was a cause of exclusion from the witness box in the great majority of instances.<sup>1</sup> Even our old English lawyers occasionally rejected the evidence of women on the ground that they are *frail*.<sup>2</sup> Sir Edward Coke,<sup>3</sup> in the reign of Charles I., without a single note of dissent or disapprobation, writes thus:—"In some cases women are by law wholly excluded to bear testimony; as to prove a man to be a villein"—*mulieres ad probationem status hominis admitti non debent*." It seems also, that in very \*early times their testimony was insufficient to prove issue born alive, so as to entitle a man to be tenant by the curtesy;<sup>4</sup> neither could they prove the summons of jurors in an assize.<sup>5</sup> [\* 80]

5. *Requiring a certain number of media of proof—*  
*Advantages of—Evils of.*

§ 65. One of the most obvious modes of guarding against misdecision consists in the exacting a certain number of witnesses or other media of proof. The advantage of a plurality of witnesses consists in this, that a false story runs great risk of being detected by discrepancies in their testimony, especially if they are questioned skilfully and out of the hearing of each other.<sup>7</sup> But, however salutary such a rule may be in countries

<sup>1</sup> Hume, *Crim. Law of Scotland*, vol. 2, pp. 339, 340; Burnett, *Crim. Law of Scotland*, 388–390; 20 *Ho. St. Tr.* 44, note.

<sup>2</sup> *Fitzh. Abr. Villenage*, pl. 37; *Bro. Abr. Testmoignes*, pl. 30.

<sup>3</sup> *Co. Litt.* 6 b.

<sup>4</sup> *Acc. Fitzh. Abr. Villenage*, pl. 37; *Bro. Abr. Testmoignes*, pl. 30, who refers to a case in the 13 *Edw. I.*; *Britton*, c. 81. See, however, the case on the eyre of York, in the 13 *Hen. III.*, cited by *Fitzh. Villenage*, pl. 43.

<sup>5</sup> See *Hargrave's Co. Litt.* 29 b, note 5.

<sup>6</sup> *Co. Litt.* 158 b.

<sup>7</sup> A celebrated application of this principle is to be found in the story of Susannah and the Elders, in the Apocrypha.

where mendacity and perjury are so common and notorious as scarcely to be looked upon as crimes,<sup>1</sup> and everywhere in some cases of a serious and peculiar nature, it is certainly not based on any principle of general jurisprudence, and wherever so considered has brought immense evils in its train.<sup>2</sup>

*Practice of the civilians and canonists.*

§ 66. The law of Moses in certain criminal cases, and the New Testament in certain ecclesiastical matters, required \*two witnesses; whence the civilians and [\* 81] canonists (the latter at least) inferred a divine command to exact that number in all cases, both civil and criminal.<sup>3</sup> The text of the Imperial Code is positive: "*Manifestè sancimus, ut unius omninò testis responsio non audiat, etiamsi præclaræ curiæ honore præfulgeat: Solâ testatione prolatam, nec aliis legitimis adminiculis causam approbatam, nullius esse momenti, certum est.*"<sup>4</sup>

<sup>1</sup> See the picture drawn by Cicero, in his oration for Flaccus, of the profligacy of the Greeks in this respect. "In some countries," says Bentham, 3 Jud. Ev. 168-9, "there have been said to exist a sort of houses-of-call, or register-offices, for a sort of witnesses of all work, as in London for domestic servants and workmen in different lines, and in some parts of Italy for assassins. Ireland, whether in jest or in earnest, was at one time noted for breeding a class of witnesses, known for trading ones by a symbol of their trade, straws sticking out of their shoes. Under the Turkish Government, it seems generally understood that the trade of testimony exists upon a footing at least as flourishing as that of any other branch of trade." The morals of mediæval Europe are well known to have been very low on this subject; and all accounts agree in describing hardened perjury as still rife throughout the East. As to India see Goodeve, Evid. 238.

<sup>2</sup> See *infra*, §§ 69 *et seq.*

<sup>3</sup> See *infra*, bk. 3, pt. 2, ch. 10.

<sup>4</sup> Cod. lib. 4, tit. 20, l. 9, § 1.

<sup>5</sup> Cod. lib. 4, tit. 20, l. 4. Bonnier in his *Traité des Preuves*, § 241, 2nd Ed., has an able argument to show that this principle was not established in the Roman jurisprudence until the time of the Lower Empire, and had its origin in the constitution of the Emperor Constantine, Cod. lib. 4, tit. 20, l. 9, § 1.

And that of the Decretals runs thus:¹ “*Licet quædam sint causæ quæ plures quàm duos exigant testes, nulla est tamen causa, quæ unius testimonio (quamvis legitimo) terminetur.*” Sometimes even this was insufficient. Five witnesses were required by the imperial law to prove certain payments:² the canon law occasionally required five, seven, or more, witnesses to make full poof;³ and the number necessary on criminal charges brought against persons in office in the church is almost incredible.⁴ By the law of Mohammed a woman

which (Bonnier thinks) converted into a rule of law what had previously been laid down as matter of advice and caution. See further on this subject, Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 2, and *infra*, bk. 3, pt. 2, ch. 10.

¹ Decretal. Greg. IX. lib. 2, tit. 20, c. 23.

² Cod. lib. 4, tit. 20, l. 18.

³ Ayl. Par. Jur. Can. Angl. 444; 1 Greenl. Ev. § 260 a, notes, 7th Ed.; *Evans v. Evans*, 1 Roberts. Eccl. R. 171.

⁴ Fortescue, in his Treatise de Laud. Leg. Angl. cap. 32 (written before the Reformation), tells us of a “*lex Generalis Concilii, quæ cavetur, ut non nisi duodecim testium depositione cardinales de criminibus convincantur.*” Waterhouse, in his Commentary on Fortescue, p. 405, says he is not aware what council is here alluded to, nor have we been able to find it; but he refers to the 2nd Council of Rome, under Sylvester, as given in the Concilia of Binius, vol. 1, pp. 315 and 318, the third chapter of which contains as follows: “*Non damnabitur præsul, nisi in septuaginta duobus, neque præsul summus à quoquam judicabitur, quoniam his scriptum est: Non est discipulus super magistrum. Presbyter autem, nisi in quadraginta quatuor testimonia non damnabitur. Diaconus autem cardine constrictis urbis Romæ, nisi in triginta sex, non condemnabitur. Subdiaconus, acolythus, exorcista, lector, nisi (sicut scriptum est) in septem testimonia filios et uxorem habentes, omnino Christum prædicantes, sicut datur mystica veritas.*” In the laws of Hen. I. c. 5, also, there is this passage: “*Non dampnetur presul nisi in lxxii. testibus; neque presul summus a quoquam judicetur. Presbiter cardinalis nisi in xliiii. testibus non dampnabitur; diaconus cardinalis nisi in xxvi.; subdiaconus et infra nisi in vii.; nec major in minorum impetitione dispareat.*” In the Law Review, vol. i. p. 380, and vol. iv. p. 133, it is stated that by the canon law, in the case of a cardinal charged with incontinence, the *plena probatio* must be established by no less than seven eye-witnesses: but no authority is cited. See also 1 Greenl. Ev. § 260 a, note (1), 7th Ed., and Devot. Inst. Canon. lib. 3, tit. 9, § 9, not. 3.

[\* 82] \*could not be convicted of adultery unless on the testimony of *four male* witnesses;<sup>1</sup> and his successor the Caliph Omar decided, with reference to this law, that all circumstantial evidence, however proximate and convincing, was of no avail, and that the four male witnesses must have witnessed the very act in the strictest sense of the word.<sup>2</sup>

§ 67. But since evidence may be circumstantial as well as direct, the system would have been imperfect were not the number of *circumstances* requisite for conviction defined with the same logical precision. *Three* presumptions at least were therefore considered necessary by certain doctors of the civil law; unless they were extremely strong, in which case *two* might suffice;<sup>3</sup> and the Austrian legislature, by a law passed so late as 1833, but now abolished, prohibited in general all condemnation from circumstances unless there were at least three. The climax of absurdity however appears in the code which until recently existed in Bavaria. Having observed that inculpativè circumstances are of three [\* 83] \*kinds: viz., *antecedent* to the act, as preparations, threats, &c.; *concomitant*, as in case of homicide a weapon of the accused found near the dead body; and, *subsequent*, as flight from justice, attempts to suborn witnesses, and the like; the Bavarian legislature ordained that some circumstances belonging to each class must be proved.<sup>4</sup>

<sup>1</sup> Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50. See also Goodeve, Evid. 113.

<sup>2</sup> Gibbon, in loc.

<sup>3</sup> Bonnier, Traité des Preuves, § 723, 2nd Ed.

<sup>4</sup> It is right to mention that the statements here made relative to the laws of Austria and Bavaria are taken from Bonnier, Traité des Preuves, §§ 723 & 727 2nd Ed.

*Abuses of judicial evidence.*

§ 68. There is unquestionably no branch of jurisprudence whose principles have been so much abused and pushed beyond their legitimate limits as judicial proof, especially with regard to its *exclusionary* rules. This arises partly from its having been comparatively little understood in former times—the substantive branches of law always coming to perfection before the adjective—and partly from artificial rules of evidence being found an excellent shield for acts which it is not desired to suppress, but which it would be unsafe or scandalous to legalize. In such cases the prohibiting the act, but requiring for the establishment of it evidence so peculiar, either in quantity or quality, as to render condemnation practically impossible, is the ready device of corrupt legislation. Some abuses of judicial evidence have been alluded to in the course of this Introduction; and we purpose to conclude it by pointing attention to *two*; which, owing to their magnitude, their prevalence, and the danger under which all tribunals, especially such as are of a permanent nature, lie from them, deserve particular notice.

*Artificial legal conviction.*

§ 69. The first of these has its origin in a natural tendency of the human mind to re-act or turn round on itself, by assuming the convertibility of the end with the means used to attain it. As connected with the \*subject before us, this displays itself in the creation of a system of *technical*, and as it were *mechanical* belief, dependent on the presence of instruments of evidence in some given number; and which has with

great truth and power been designated by Bonnier, in his *Traité des Preuves*,<sup>1</sup> “*système qui tarifait les témoignages, au lieu de les soumettre à la conscience du juge.*” It is strongly illustrated by the practice of the civil and canon laws on the continent of Europe, thus ably described by the eminent French lawyer just quoted.\* “The technical rules relative to testimonial proof which were devised, or at least developed, by the doctors of the middle ages, are of two kinds. Some tend to exact absolutely certain conditions in order that legal conviction may exist, while others, still more extravagant, to create in certain cases an *artificial legal conviction* even where real conviction may not exist.” “If,” he adds in another place,<sup>3</sup> “the rule rejecting the testimony of a single witness was not perfectly reasonable; another principle, dangerous in a very different way, was that which, creating a legal conviction altogether artificial, established that the concurrent depositions of two unsuspected witnesses must necessarily induce condemnation. Here the application of the texts of the *Corpus Juris* was completely mistaken; for such a logical error was never professed at Rome, or even at Constantinople.” But it was exactly suited to the scholastic and supersubtle spirit of more recent times. The texts of the code and of the decretal being peremptory, that the testimony of one witness could not be acted on under any circumstances,<sup>4</sup> and that two were sufficient in all cases where no greater number

<sup>1</sup> § 199, 2nd Ed.

<sup>2</sup> Id. § 239.

<sup>3</sup> Bonnier, *Traité des Preuves*, § 242, 2nd Ed. See, also, 5 Benth. *Jud. Ev.* 470, 471.

<sup>4</sup> Cod. lib. 4, tit. 20, l. 9. “Unius omnino testis responsio non audiatur, etiamsi præclaræ curiæ honore præfulgeat.”

\*was expressly required by law;<sup>1</sup> the doctors of the civil and canon laws hastily (they perhaps [\* 85] thought logically) inferred that the deposition of two witnesses who were *omni exceptione majores*, amounted to *proof*; and bestowed on it the name of *full proof*—“*plena probatio*”<sup>2</sup>—forgetting that proof means persuasion wrought in the mind, and consequently must depend, not on the number of instruments of evidence employed, but on their force, credibility, and concurrence. Nor was this all. If the testimony of two witnesses made full proof, that of one must be a *half proof*, which they called “*semi-plena probatio* ;”<sup>3</sup> and this arithmetical mode of estimating testimony being once established, it was extended by analogy to presumptive evidence, so that the subtilties of “proof” and “semi-proof” ran through the entire judicial system. Thus admissions extracted by torture,<sup>4</sup> entries made by tradesmen in their books to the prejudice of other persons,<sup>5</sup> an oath to the truth of his demand or defense administered by the judge to the plaintiff or defendant,<sup>6</sup> and occasionally even fame or rumor,<sup>7</sup> were recognized as semi-proofs; two such usually constituting full proof. Some of the later civilians; feeling the absurdity of the position that the probative force of evidence is necessarily represented by unity,

<sup>1</sup> Dig. lib. 22, tit. 5, l. 12. “*Ubi numerus testium non adjicitur, etiam duo sufficiunt: pluralis enim elocutio duorum numero contenta est.*” See, also, Heinec. ad Pand. pars 4, § 143.

<sup>2</sup> Heinec. ad Pand. pars 4, §§ 118 and 143; Mascard. de Prob. Quæst. 11; Ayl. Par. Jur. Can. Angl. 544, 448.

<sup>3</sup> Mascard in loc. cit.; Ayl. Par. Jur. Can. Angl. 444.

<sup>4</sup> Mascard. de Prob. Concl. 1392. See, also, Bonnier, *Traité des Preuves*, § 241, *vers. fin.*, 2nd Ed.

<sup>5</sup> Heinec ad Pand. pars 4, § 134; 1 Ev. Poth. 719.

<sup>6</sup> 1 Ev. Poth. §§ 719, 829, 834; Heinec. ad Pand. pars 3, §§ 28, 29.

<sup>7</sup> Mascard. de Prob. Concl. 754, 755; Lancel. Inst. Jur. Can. lib. 3, tit. 14, §§ 1 and 54; Ayl. Par. Jur. Can. Angl. 444.

zero, or one-half, introduced a sub-division of semi-proof into semi-plena \*major, semi-plena, and semi-plena [\* 86] minor;<sup>1</sup> which, in all probability, only served to make matters worse, by rendering the system more technical. And a like rule was sometimes applied to the *credit* of witnesses. "The parliament of Toulouse," says Bonnier,<sup>2</sup> quoting another French author, "has a peculiar mode of dealing with objections; it sometimes receives them according to their different quality, so that they do not destroy the deposition of the witness altogether, but leave it good for an eighth, a quarter, a half, or three-quarters; and a deposition thus reduced in value requires the aid of another to become complete. For example, if on the depositions of four witnesses objected to, two are reduced to a half, that makes one witness; if the third deposition is reduced to a fourth, and the fourth to three-quarters, that makes another witness, and consequently there is a sufficient proof by witnesses, although all have been objected to, and suffered in some degree from the objections taken."

§ 70. So firmly was this vicious principle worked into the law of France that, in the great legal reform which took place in that country at the beginning of the present century, it was deemed advisable to take effective measures for its extirpation. With this view the Code Napoleon<sup>3</sup> ordained that in criminal cases a sort of

<sup>1</sup> Heinec. ad Pand. pars 4, § 118; Kelemen, Institutiones Juris Hungarici Privati, lib. 3, §§ 98 and 100.

<sup>2</sup> Bonnier, Traité des Preuves, § 243, 2nd Ed. This practice of the parliament of Toulouse is likewise alluded to in Burnett's Crim. Law of Scotland, 528. It is worthy of remark that the same vicious principle was at one period creeping into the jurisprudence of the last-mentioned country, which borrowed so much from the civil law. See Hume's Crimin. Law of Scotland, &c., vol. ii. ch. 10, pp. 293 *et seq.*; and 19 How. St. Tr. 75 (note).

<sup>3</sup> Code d'Instruction Criminelle, liv. 2, tit. 2, ch. 4, sect. 1, § 342.



general instruction should be read to every jury by their foreman before commencing their deliberations, \*and should also be affixed in large letters in the room where they retire to deliberate; part of [\* 87] which is as follows:—“*La loi ne demande pas compte aux jurés des moyens par lesquels ils se sont convaincus; elle ne leur prescrit point de règles desquelles ils doivent faire particulièrement défendre la plénitude et la suffisance d'une preuve; elle leur prescrit de s'interroger eux-mêmes dans le silence et le recueillement, et de chercher, dans la sincérité de leur conscience, quelle impression ont faite sur leur raison les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur dit point, 'Vous tiendrez pour vrai tout fait attesté par tel ou tel nombre de témoins;' elle ne leur dit pas non plus, 'Vous ne regarderez pas comme suffisamment établie toute preuve qui ne sera pas formée de tel procès verbal, de telles pièces, de tant de témoins ou de tant d'indices;' elle ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs, 'Avez-vous une intime conviction?'*” This seems running into the other extreme—for it implies, in language at least, that the jury are not confined to the legal evidence adduced, but are to form their judgment on whatever they know of themselves, or have heard elsewhere, or believe, respecting the matter before them. However this may be, the French civil code containing no analogous provision, Bonnier (in 1843 and 1852) thought it necessary to consider whether in civil cases the two witnesses are still required, or the “intime conviction” is dispensed with; both which points he resolves in the negative.<sup>1</sup>

<sup>1</sup> Bonnier, *Traité des Preuves*, §§ 201, 202, and 2nd Ed. §§ 241, 242. It is but justice to many of the eminent civilians who in later times commented on the Roman law, to state that they were perfectly alive to the absurdity of this

*Bentham's scale.*

[\* 88] \* § 71. The substitution of arithmetic for observation and reasoning when estimating the value of

theory of proof and semi-proof. See Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 2; Heinec. ad Pand. pars 4, § 118. It was, however, too firmly established to be shaken, so that no resource remained but to evade it; and the working of the system has been thus ably exposed:—"In the Roman law, two witnesses are pronounced indispensable. In the penal branch (the higher part at least), what followed? Torture. By fewer than two witnesses, a man was not to be consigned to death; but by a single witness he might at all times be consigned to worse than death. If, then, being guilty, he had it in his power to relate and circumstantiate a guilty act, at any time, if he thought fit, he might, at the price of future suffering, release himself from present torments. But if, not being guilty, and in consequence not having it in his power to circumstantiate the guilty act, he had it not in his power to release himself at that price, he was to suffer on: perishing or not perishing, under or in consequence of the infliction, as it might happen. Upon the face of it, and probably enough in the intention of the framers, the object of this institution was the protection of innocence. The protection of guilt, and the aggravation of the pressure upon innocence, was the real fruit of it. In the non-penal branch, the experienced mischievousness of the rule forced men upon another shift, of which, if the mischievousness be not so serious, the absurdity is more glaring. I mean the operation of splitting one man into two witnesses. Proposing to himself to make a customer, or non-customer, pay for what he has had, or not had—a shopkeeper makes, in his own books, an entry of the delivery of the goods accordingly, and by this entry he makes himself one witness. A suit is then instituted by himself, against the supposed customer, for the value of the goods: he now takes an oath in a prescribed form, swearing to the justness of the supposed debt, and by this oath he coins himself into a second witness, the second witness which the law requires. By the same rule, if three had been the requisite complement of witnesses, two such oaths might have completed it; if four witnesses, three oaths; and so on. With a splitting mill of such power at his command, a man need never be at a loss for witnesses. In every cause, the plaintiff, to gain it, must make full proof (*probatio plena*). The tradesman's books make half a full proof (*probatio semi-plena*): his oath, as above (his *suppletory oath*, it is called), makes the other half. Heinec. iv. 134. Sixteen paragraphs before, in the book of authority, from which, for reference sake, the instance has been taken, the reader has been assured (and that without exception, and in the most pointed terms), that a half full proof, though composed of the testimony, regularly extracted, of a disinterested witness, of the most illustrious and consequently trustworthy class, goes absolutely for nothing." 5 Benth. Jud. Ev. 481-483. That this statement of the practice of the civilians does not rest on the unsupported authority of Heineccius, see the authorities cited in the notes to the present and preceding articles.

evidence is \*not confined to past ages. Bentham, in his work on Judicial Evidence, proposes a [\* 89] plan so extraordinary that it is but justice to give it in his own words. After observing that a correct mode of expressing degrees of persuasion and probative force is an object of great importance, but that the language current among the body of the people is in this particular most deplorably defective, &c.,<sup>1</sup> he proceeds thus<sup>2</sup> —“Conceive the possible degrees of persuasion, positive and negative together, to be thus expressed: the degrees of positive persuasion — persuasion affirming the existence of the fact in question — constitute one part of the scale, which call the positive part. The degrees of negative persuasion — persuasion disaffirming or denying the existence of the same fact — constitute the other part of the scale, which call the negative part. Each part is divided into the same number of degrees: suppose ten, for ordinary use. Should the occasion present a demand for any ulterior degree of accuracy, any degree that can be required may be produced at pleasure, here, as in other ordinary applications of arithmetic, by multiplying this ordinary number of degrees in both parts by any number, so it be the same in both cases: the number *ten* will be found the most convenient multiplier. In this case, instead of 10, the number of degrees on each scale will be 100 or 1000, and so on. At the bottom of each part of the scale stands 0: by which is denoted the non-existence of any degree of persuasion on either side: the state which the mind is in, in the case in which the affirmative and the negative, the existence and the non-existence of the fact in question, present themselves to it, as being exactly as probable the one as the other.

<sup>1</sup> Benth. Jud. Ev. vol. i. p. 74.<sup>2</sup> Id. 75-80.

Such is the simplicity of this mode of expression, that no material image representative of a scale seems necessary to the employment of it. The scale being understood \*to be composed of ten degrees—in the [\* 90] language applied by the French natural philosophers to thermometers, a *decigrade* scale—a man says, my persuasion is at 10 or 9, &c. affirmative, or at 10 or 9, &c. negative: as, in speaking of temperature, as indicated by a thermometer on the principle of Fahrenheit, a man says, the mercury stood at 10 above, or at 10 below, 0. If ulterior accuracy be regarded as worth pursuing, to the *decigrade* substitute (giving notice) a *centigrade* scale: and if that be not yet sufficient, a *milligrade*. \*

\* \* \* \* \* For want of an adequate mode of expression, the real force of testimony in a cause has hitherto been exposed to perpetual misrepresentations. \* \* \* \* \* Old measures of every kind receive additional correctness; new ones are added to the number: the electrometer, the calorimeter, the photometer, the eudiometer, not to mention so many others, are all of them so many productions of this age. Has not justice its use as well as gas? ”

### *Fallacy of it.*

§ 72. The most singular circumstance connected with this fantastic suggestion is, its being accompanied by an admission that after all the only true scale is an *infinite* one, but that that is unfortunately inapplicable.<sup>1</sup> The fallacy of the whole has been thus ably exposed in a note by Dumont, the French translator of Bentham.<sup>2</sup>

<sup>1</sup> 1 Benth. Jud. Ev. 74, 75, and 100.

<sup>2</sup> We have taken this on the authority of the Editor of Bentham's Jud. Ev. vol. i. pp. 106–8, A. D. 1827. Continental writers, admirers of Bentham's works in general, condemn his thermometer of persuasion. Besides the above note

"I do not dispute the correctness of the author's principles ; and I cannot deny that, where different witnesses \*have different degrees of belief, it would be extremely desirable to obtain a precise knowledge [\* 91] of these degrees, and to make it the basis of the judicial decision ; but I cannot believe that this sort of perfection is attainable in practice. I even think, that it belongs only to intelligences superior to ourselves, or at least to the great mass of mankind. Looking into myself, and supposing that I am examined in a court of justice on various facts, if I cannot answer 'yes' or 'no' with all the certainty which my mind can allow, if there be degrees and shades, I feel myself incapable of distinguishing between two and three, between four and five, and even between more distant degrees. I make the experiment at this very moment ; I try to recollect who told me a certain fact ; I hesitate, I collect all the circumstances, I think it was A. rather than B. : but should I place my belief at No. 4, or No. 7 ? I cannot tell. A witness who says, 'I am doubtful,' says nothing at all, in so far as the judge is concerned. It serves no purpose, I think, to inquire after the degrees of doubt.' But these different states of belief, which, in my opinion, it is difficult to express in numbers, display themselves to the eyes of the judge by other signs. The readiness of the witness, the distinctness and certainty of his answers, the agreement of all the circumstances of his story with each other,—it is this which shows the confidence of the witness in himself. Hesitation, a painful searching

of Dumont, see Bonnier, *Traité des Preuves*, § 244, 2nd Ed., who calls it a "testimoniomètre," and rather fancifully observes, "*Soumise au scalpel de l'analyse, l'intime conviction se flétrit ; de même que les fleurs d'un herbier se dessèchent et perdent leurs vives couleurs.*"

<sup>1</sup> Acc. Domat, part. 1, liv. 3, tit. 6, sect. 3, § xiv.

for the details, successive connections of his own testimony,—it is this which announces a witness who is not at the *maximum* of certainty. It belongs to the judge to appreciate these differences, rather than to the witness himself, who would be greatly embarrassed if he had to fix the numerical amount of his own belief. Were this scale adopted, I should be apprehensive that the authority of the testimony would often be inversely as the wisdom of the witnesses. Reserved men — men \*who [\* 92] knew what doubt is — would, in many cases, place themselves at inferior degrees, rather than at the highest ; while those of a positive and presumptuous disposition, above all, passionate men, would almost believe they were doing themselves an injury, if they did not take their station immediately at the highest point. The wisest thus leaning to a diminution, and the least wise to an augmentation, of their respective influence on the judge, the scale might produce an effect contrary to what the author expects from it. \* \* \* It appears to me, that, in judicial matters, the true security depends on the degree in which the judges are acquainted with the nature of evidence, the appreciation of testimony, and the different degrees of proving power. These principles put a balance into their hands, in which witnesses can be weighed much more accurately than if they were allowed to assign their own value ; and even if the scale of the degrees of belief were adopted, it would still be necessary to leave judges the power of appreciating the intelligence and morality of the witnesses, in order to estimate the confidence due to the numerical point of belief at which they have placed their testimony.”

*Application of the calculus of probabilities to judicial testimony.*

§ 73. The mathematical calculus of probabilities, or "Doctrine of Chances," has, as is well known, been found of essential service in various political and social matters, apparently unconnected with the exact sciences. The modern system of Life Insurance, in particular, almost owes its existence to that branch of mathematics. Among other things, the notion presented itself of applying the calculus of probabilities to estimating the value of testimony given in courts of justice,<sup>1</sup>—an object sought to be accomplished by adapting the established formulæ, which express the probability [\* 93] of the occurrence of independent events, to the probability of the evidence of concurring witnesses or independent facts. But no real analogy exists in this respect between judicial testimony and life insurance or other matters of a similar nature. In the latter a series of facts and figures, collected by long and accurate observation, and carefully registered, supply data that bring the subject within the range of mathematical analysis, a condition which wholly fails when we attempt to deal *practically* with the former.<sup>2</sup> Still even here the calculus of prob-

<sup>1</sup> Laplace, *Essai Philosophique sur les Probabilités*, 5th Ed. ; Lacroix, *Calcul des Probabilités*, Paris, 1833 ; Poisson, *Recherches sur la Probabilité des Jugemens en matière civile et en matière criminelle*, &c. Paris, 1837; and the article "Probability" in the *Encyclopædia Britannica*.

<sup>2</sup> The fundamental principle on which the calculus of probabilities rests is, that *in order to determine the probability of an event, we must take the ratio of the favorable chances or cases to all the possible cases which in our judgment may occur*. Let  $m+n$  be the total number of possible cases, all equally likely;  $m$  represents the number of cases in favor of event A., and  $n$  those of event B.; the probability of event A. will be  $\frac{m}{m+n}$ , and that of B.  $\frac{n}{m+n}$ . It is also evident that unity is the symbol of certitude; for, by hypothesis, one of the events must happen; and adding the probabili-

[\* 94] abilities \*is not without its use. “La plupart de nos jugemens,” says one of the most distinguished writers upon it,<sup>1</sup> “étant fondés sur la probabilité des

ties of A. & B., we have  $\frac{m+n}{m+n}=1$ . The probability of the concurrence of independent events is, not the sum of their simple probabilities, but their compound ratio, i. e., the product of the probabilities of each considered separately. Thus, if  $\frac{m}{m+n}$  be the probability of event A.,  $\frac{m'}{m'+n'}$  that of B.,  $\frac{m''}{m''+n''}$  that of C., &c., the probability of their concurrence will be expressed by this formula —  $\left(\frac{m}{m+n}\right) \left(\frac{m'}{m'+n'}\right) \left(\frac{m''}{m''+n''}\right)$  &c. When the total number of possible cases, and their ratio to the number of favorable chances, are unknown, still approximate values of the probabilities of events can be obtained, by having recourse to hypotheses framed according to the results of a previous number of trials or observed events.

The calculus of probabilities has been applied to the subject of *human testimony*, by supposing that, in a certain number of depositions, say  $m+n$ , a witness has told truth in  $m$  cases, and falsehood in  $n$  cases; although, in order to determine with accuracy the probability of the fact to which he deposes, the intrinsic, or *a priori* probability of that fact itself must be taken into the account. Let there be two witnesses, A. and B.; and suppose that in  $m$  cases A. has spoken truth, and in  $n$  cases falsehood, the analogous numbers in the case of B. being  $m'$  and  $n'$ ; the probability of the truth of the testimony of A. is  $\frac{m}{m+n}$ , and that of B.  $\frac{m'}{m'+n'}$ . So long as it is not known whether they are deposing to the same thing or not, the probability that both are right is  $\frac{mm'}{(m+n)(m'+n')}$ ; but when they agree about the same thing, the terms  $mn'$  and  $m'n$  belong to impossible cases, and the above expression becomes  $\frac{mm'}{mm'+nn'}$ . By a similar process we shall find that the probability of the falsehood of their joint testimony is  $\frac{nn'}{mm'+nn'}$ . The same principle can easily be extended to any number of witnesses,  $p$ , so that supposing the probability of the veracity of each to be the same, we shall have  $m=m'$ ,  $n=n'$ , &c., and the expression last obtained will become  $\frac{mp}{mp+np}$  and  $\frac{np}{mp+np}$ . If instead of witnesses we have *circumstances*, the probability of any fact, as, for instance, the guilt or innocence of an accused person, is calculated in the same way, treating each circumstance as a testimony, and will be the compound result of the simple probabilities arising from each of those circumstances; though in estimating strictly the probability of guilt resulting from each circumstance, the probability of the truth or falsehood of the witnesses deposing to that circumstance must be taken into the account.

For the deduction of the above formulæ, see the works cited in the last note. The most cursory inspection of these expressions will show how impossible it would be for the *practical* purposes of justice to assign even approximate values to the quantities  $m$ ,  $m'$ ,  $n$  and  $n'$ , to say nothing of the other probabilities necessary to be computed.

<sup>1</sup> Laplace, *ut suprà*, p. 137.



témoignages, il est bien important de la soumettre au calcul. La chose, il est vrai, devient souvent impossible, par la difficulté d'apprécier la véracité des témoins, et par le grand nombre de circonstances dont les faits qu'ils attestent, sont accompagnés. Mais on peut dans plusieurs cas résoudre de problèmes qui ont beaucoup d'analogie avec les questions qu'on se propose, et dont les solutions peuvent être regardées comme des approximations propres à nous guider, et à nous garantir des erreurs et des dangers auxquels de mauvais raisonnemens nous exposent. Une approximation de ce genre, lorsqu'elle est bien conduite, est toujours [\* 95] préférable aux raisonnemens les plus spécieux." The calculus of probabilities has accordingly been applied in English treatises on evidence to hypothetical states of facts, to illustrate the value of different *kinds* of evidence.<sup>1</sup>

*Double principle of decision.*

§ 74. The remaining abuse, if less monstrous than the other,<sup>2</sup> is to the full as formidable; and is sure to be found wherever the rules of evidence are too technical or artificial, and the decision of questions of fact is intrusted to a judge, instead of a jury or other casual tribunal. Although no tribunal could venture *systematically* to disregard a rule of evidence, however absurd or mischievous—this would be setting aside the law—tribunals may occasionally suspend the operation of such a rule without risk, and even with applause, when its enforcement would shock common sense; and the upright man who has the misfortune to be judge under such a system, either relaxes the rule in those cases, or

<sup>1</sup> See 1 Stark. Evid. 568, 3rd Ed.; and *infra*, bk. 3, pt. 2, ch. 2.

<sup>2</sup> *Vide supra*, § 69 *et seq.*

carries it out at all hazards under all circumstances. The unjust judge, on the contrary, converts this very strictness of the law into an engine of despotism, by which he is enabled to administer expletive or attributive justice at pleasure; while the world at large see nothing but the exoteric system, little suspecting that there is in the back ground an esoteric one with which only the initiated are acquainted. When a rule of this kind militates against an obnoxious party, the judge declares that he is bound to administer the law as he finds it, that it is not for him to overturn the decisions of his predecessors, or sit in judgment on the wisdom of the legislature: and to blame him for this is impossible. But when the party against whom the rule presses is a favored one — the judge discovers that laws were made [\* 96] \* for the benefit of men, not their ruin, that technical objections argue an unworthy cause, and that the first duty of every tribunal is to administer substantial justice at any price. The badness of the rule is so evident that it is difficult to find fault with this either: and by thus shifting the urn from which the principle of his decision is taken, the judge sits, like the fabled Jove,<sup>1</sup> the absolute arbiter of almost every case that comes before him.<sup>2</sup>

<sup>1</sup> Δοιοὶ γὰρ τε πίθοι κατακείαται ἐν Διὸς οὐδὲι  
Δώρων, οἷα δίδωσι, κακῶν ἕτερος δὲ, ἑάων

ᾧ μὲν καμμίξας δῶη Ζεὺς τερπικέραυνος,

Ἄλλοτε μὲν τε κακῶ ὄγε κίρεται, ἄλλοτε δ' ἐσθλῶ, &c.

Il. Ω. 527.

Thus translated by Pope:—

Two urns by Jove's high throne have ever stood,  
The source of evil one, and one of good;  
From thence the cup of mortal man he fills,  
Blessings to these, to those distribute ills; &c.

<sup>2</sup> This is what Bentham calls, "The Double Fountain Principle;" *Jud. Ev. bk. 8, ch. 23*. But how strange he could not see that its most fatal enemy is a

*Conclusion.*

§ 75. We have thus endeavored to explain the principles on which judicial evidence is founded, to demonstrate its utility and necessity, and point out the chief abuses to which it is liable. The peculiar system existing in any particular place will of course depend much on the substantive municipal law with which it is connected, the customs and habits of society, and the standard of truth among the population. In this it only shares the fate of laws in general: of which it has been truly said, “Perpetua lex est, nullam legem humanam ac positivam perpetuam esse.”<sup>1</sup> “Leges naturæ perfectissimæ sunt et immutabiles: Legis humanæ nascuntur, vivunt, et moriuntur.”<sup>2</sup>

jury; and that it must reign supreme under his own judicial system, where questions both of law and fact would be determined by a single judge, with the nominal check of appeal to a superior, equally disposed to apply the principle in question?

<sup>1</sup> Bacon, Max. *sub reg.* 19.

<sup>2</sup> *Calvin's case*, 7 Co. 25, a.



## \* OBJECT AND DIVISION OF THE WORK. [\* 97]

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### *Object of the work.*

§ 76. The judicial evidence of any system of jurisprudence may be defined as that branch of its adjective law which ascertains the nature, determines the admissibility, controls or modifies the effect of the evidence adduced before its tribunals, and regulates their practice relative to the offering, opposing, and receiving it. Having, therefore, in the Introduction treated of evidence in general, and of judicial evidence as distinguished from it, we proceed to the more immediate object of the present work — the system of judicial evidence established by the common law of England, for the use of its ordinary and regular tribunals, on the trial of facts in question before them — known in practice by the title of “The Law of Evidence.” It is necessary to be thus precise, for several other kinds of evidence are observable in our jurisprudence. By sundry statutes, also, peculiar modes of proof are either prescribed or permitted in certain proceedings.

### *Division of the work.*

§ 77. “The Law of Evidence” will be best understood by treating of it under the four following heads :

[\* 98] \*and the present work is divided into four Books accordingly.

1. The English Law of Evidence in general.
2. Instruments of Evidence.
3. Rules regulating the admissibility and effect of Evidence.
4. Forensic Practice and examination of Witnesses.

# \*BOOK I.

[\* 99]

## THE ENGLISH LAW OF EVIDENCE IN GENERAL.

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### *Division of the subject.*

§ 78. This Book consists of two Parts. In the first it is proposed to take a general view of the English law of evidence; the second will be devoted to the history of its rise and progress, with some observations on its actual state and prospects.

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## PART I.

### GENERAL VIEW OF THE ENGLISH LAW OF EVIDENCE.

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### 1. *Grounds of judicial evidence in general.*

§ 79. The necessity for judicial evidence, as distinguished from natural or moral evidence, has been shown, in the Introduction to this work, to arise out of the nature of municipal law and the functions of judicial tribunals. The limitations which can properly be imposed by municipal law on tribunals investigating facts were there traced to the following principles. First, The maxim “*Optima est lex, quæ minimum relinquit arbitrio judicis;*”<sup>1</sup> — the power of tribunals would be absolute if bounds were not set to their discretion in declaring facts proved or disproved. Secondly, The necessity for speedy action in tribunals; which renders it part of the duty of the legislator to supply rules for the disposal of all matters which come before them,

<sup>1</sup> Bac. de Augm. Scient. lib. 8, c. 3, tit. 1, Aphorism. 46.



however difficult or even impossible it may be to get at the truth. Thirdly, The evils that would arise from considering only the direct, and disregarding the collateral, consequences of decisions. Lastly, the difference between the investigation of historical truth and of the \*facts which come in question in courts of justice; the characteristic dangers to which the [ \* 101 ] latter is exposed requiring that characteristic securities be framed to meet them. It was further shown, that while these principles may be, and frequently have been, overstepped and pushed beyond their legitimate limits, the *chief* abuses to be guarded against by the legislator in dealing with judicial evidence are twofold. First, The creation of a technical and artificial system of belief, dependent on the presence of evidence in some particular quantity, without regard to its weight and credibility; and, Secondly, The establishment of rules too stringent and technical to be always enforced, which a dishonest or prejudiced tribunal would consequently be enabled without danger to itself to insist on or relax, according to its interest, pleasure or caprice.

## 2. *Characteristic features of the English system.*

§ 80. The characteristic features of the English system of judicial evidence, like those of every other system, are essentially connected with the constitution of the tribunal by which it is administered; and may be stated as consisting of three great principles. 1. The admissibility of evidence is matter of *law*, but the weight or value of evidence is matter of *fact*. 2. Matters of law, including the admissibility of evidence, are proper to be determined by a *fixed*, matters of fact by a *casual*, tribunal. 3. In determining the admissibility of evidence, the

production of the *best evidence* should be exacted. We propose to consider them in their order; and will afterward notice two other remarkable features of our system, less characteristic indeed, but exercising a most powerful influence in extracting truth and securing rectitude of decision; namely, the mode in which evidence is received by our tribunals, and the publicity of our judicial proceedings.

3. *The admissibility of evidence is matter of law; the weight of evidence is matter of fact.*

§ 81. The first of the three may be dispatched in a few words; as the least reflection will show [ \* 102 ] how absurd it would be in any legislator to attempt to lay down rules for estimating the credit due to witnesses, or the probability of every fact which may present itself in the innumerable combinations of nature and human action.<sup>1</sup> The reliance to be placed on the statements of witnesses, and the inferences to be drawn from facts proved, must therefore be left for the most

<sup>1</sup> The following passage from the Digest is commonly cited in proof and illustration of this: "D. Hadrianus Vivio Varo Legato provinciæ Ciliciæ rescripsit, eum, qui judicat, magis posse scire, quanta fides habenda sit testibus. Verba epistolæ hæc sunt: 'Tu magis scire potes, quanta fides habenda sit testibus: qui, et cujus dignitatis, et cujus æstimationis sint: et qui simpliciter visi sint dicere, utrum unum eundemque meditatam sermonem attulerint; an ad ea, quæ interrogaveras, ex tempore verisimilia responderint.' Ejusdem quoque Principis extat rescriptum ad Valerium Verum de excutienda fide testium, in hæc verba: 'Quæ argumenta ad quem modum probandæ cuique rei sufficiant, nullo certo modo satis definiri potest: sicut non semper, ita sæpe sine publicis monumentis cujusque rei veritas deprehenditur: alias numerus testium, alias dignitas et auctoritas: alias veluti consentiens fama confirmat rei, de qua quæritur, fidem. Hoc ergo solum tibi rescribere possum summam, non utique ad unam probationis speciem cognitionem statim alligari debere: sed ex sententia animi tui te æstimare oportere, quid aut credas, aut parum probatum tibi opinaris.' Idem Divus Hadrianus Junio Rufino Proconsuli Macedoniæ rescripsit, 'testibus se, non testimoniis crediturum.'" Dig. lib. 22, tit. 5, l. 3, §§ 1, 2, 3.

part to the sagacity of tribunals. But even here, for the reasons already given, some limits must be imposed ; and the same causes which render artificial rules of evidence essential to the administration of justice show that those rules ought, as far as possible, to partake of the nature of other rules of municipal law.<sup>1</sup> And however constituted the tribunal, but especially when it is of the mixed form that will be described presently, the true line seems to be that the rules of law on this subject ought in general to be confined to the *admissibility* of proof, leaving its *weight* to the appreciation of the tribunal.

\*4. *Common law tribunal for deciding issues of fact.*

[ \* 103 ] § 82. Secondly. The ordinary common-law tribunal for deciding issues of fact,<sup>2</sup> consists of a court composed of one or more judges, learned in the law and armed with its authority ; assisted by a jury of twelve men, unlearned in the law, taken indiscriminately from among the people of the county where the venue is laid, and possessing property to a defined amount. No “*recusatio judicis*” is allowed so far as the court is concerned ; but jurors are required to be “*omni exceptione*

<sup>1</sup> Introd. pt. 2.

<sup>2</sup> In some few instances the trial is by the court, without a jury: *i. e.*, trial by the record, inspection, certificate, and witnesses. 3 Blackst. Com. 330. The 9 & 10 Vict. c. 95, s. 69, empowers judges of county courts to try questions of fact without a jury, provided neither party to the action requires a jury to be summoned. So, by the 21 & 22 Vict. c. 27, s. 5, the court of chancery may order any question of fact, arising in any suit or proceeding, to be tried before the court itself, without a jury ; and the 17 & 18 Vict. c. 125, s. 1 (as amended by 21 & 22 Vict. c. 74, s. 5), enables the court or a judge to try causes without a jury, if the parties by consent in writing empower them to do so : but the verdict is not to be questioned on the ground of its being against the weight of evidence. And by sects. 3 and 6 the court or a judge, or a judge at *nisi prius*, may refer to an arbitrator chosen by the parties, or to an officer of the court, cases where the matter in dispute consists of matters of mere account, which cannot conveniently be tried in the ordinary way.

maiores," and may be challenged by the litigant parties, for want of the requisite qualifications, as well as for certain causes likely to exercise an undue influence on their decision ; in addition to which, persons accused of treason or felony are allowed to challenge peremptorily, without cause, the former as many as thirty-five, the latter twenty, of the panel. The court is charged with the general conduct of the proceedings — it decides all questions of law and practice, including the admission and rejection of evidence ; and when the case is ripe for adjudication, sums it up to the jury — explaining the questions in dispute, with the law as bearing on them, pointing out on whom the burden of proof lies, and recapitulating the evidence, with such comments and observations as may seem fitting. Moreover, as the

[ \* 104 ] \*decisions of tribunals on facts ought to be based on reasonable evidence, and when the facts are undisputed the decision as to what is reasonable is matter of law, and consequently within the province of the court ;<sup>1</sup> it follows that it is the duty of the court to determine whether, assuming as true all the evidence adduced by the party on whom the burden of proof lies, the jury could reasonably, *i. e.*, without acting unreasonably in the eye of the law, decide in his favor upon it, and if not, then to withhold the case from their consideration :<sup>2</sup> a principle commonly enunciated by the phrase, — "Whether there be *any* evidence, is a question for the judge. Whether *sufficient* evidence, is for the

<sup>1</sup> *Mitchell v. Williams*, 11 M. & W. 205, 216, per Alderson, B.

<sup>2</sup> *Toomey v. The Brighton Railway Company*, 3 C. B., N. S. 146; *Cornman v. The Eastern Counties Railway Company*, 5 Jurist, N. S. 657; *Hodges v. Ancrum*, 11 Exch. 214; *Avery v. Bowden*, 6 E. & B. 962, 973-4; *Hall v. Featherstone*. 4 Jurist, N. S. 813, 814, per Martin, B.

jury." On the other hand the decision of the facts in issue is the exclusive province of the jury; who are therefore to hear the evidence and comments made on it, to determine the credit due to the testimony of the witnesses, and draw all requisite inferences of fact from the evidence. Errors committed by the court, either in matters of law or in admitting or rejecting evidence, and occasionally even in matters of practice, are corrected by application to a superior tribunal; and if a jury misconduct themselves to the defeat of justice, as, for instance, if they determine by lot what verdict to give, or before giving it hear other evidence besides that which was adduced in open court, their verdict will be avoided. In civil cases the court above will award a new trial if the jury deliver a verdict clearly founded on a misunderstanding of the law,<sup>2</sup> or find what is called a perverse verdict, *i. e.*, refuse to listen to the law as \*correctly laid down to them by the judge.<sup>3</sup> So if they find a verdict against the evidence, *i. e.*, [\* 105] a verdict not merely erroneous in the judgment of the court above, but so unequivocally against the weight of evidence that it ought not to be allowed to stand.<sup>4</sup> New trials are also sometimes granted when a party has been taken by surprise at the trial, or has discovered important evidence, unknown to him at the time it took place, and on some other grounds to which it is unnecessary to

<sup>1</sup> *Carpenters' Company v. Hayward*, 1 Dougl. 374, 375, per Buller, J. See also 1 Phil. Ev. 4, 10th Ed.; *R. v. Smith*, Leigh & Cave, C. C. 607.

<sup>2</sup> *The Att.-Gen. v. Rogers*, 11 M. & W. 670

<sup>3</sup> *Mould v. Griffiths*, 8 Jurist, 1010, per Parke, B.; *Saunders v. Davies*, 16 Jur. 481, per Pollock, C. B.; *Hawkins v. Alder*, 18 C. B. 640, per Jervis, C. J.; *King v. Poole*, Ca. temp. Hardw. 23, 26, per Hardwicke, C. J.

<sup>4</sup> "The discretion of the court to grant a new trial must be a *judicial*, and not an *arbitrary* discretion": per Glyn, C. J., in *Wood v. Gunston*, Sty. 466. See, also, *Creed v. Fisher*, 9 Exch. 472.

refer. In criminal cases, generally speaking, points of law must be reserved by the judge, and new trials are not grantable. This division of the functions of the judge and jury is expressed by the maxim, "*ad quæstionem facti non respondent iudices; ad quæstionem juris non respondent juratores.*"<sup>1</sup> Thus, where the defendant, in an action for malicious prosecution, gives evidence to prove reasonable and probable cause, it is for the jury to find the facts; and it is for the judge to decide, as matter of law, whether the facts proved amount to reasonable and probable cause.<sup>2</sup> But the above maxim must be taken with these limitations. 1st. Facts on which the *admissibility* of evidence depends are determined by the court, not by the jury.<sup>3</sup> Thus, whether a sufficient foundation is laid for the reception of \*secondary evidence is [\* 106] for the judge,<sup>4</sup> and if the competency of a witness turns on any disputed fact he must decide it.<sup>5</sup> So, whether a confession in a criminal case is receivable;<sup>6</sup> and whether on a charge of homicide a dying declaration was made by the deceased at a time when he was under the conviction of his impending death, in which case alone it is admissible.<sup>7</sup> And it seems the better opinion

<sup>1</sup> This maxim is frequent in our old books; Co. Litt. 155 b, 226 a, 295 b; 8 Co. 155 a; 9 Id. 13 a, 25 a; 11 Id. 10 b; Vaugh. 149, &c., &c.; but many of our readers will probably be surprised to find that it has also been long known on the continent. See Bonnier, *Traité des Preuves*, § 74.

<sup>2</sup> *Panton v. Williams* (in Cam. Scac.), 2 Q. B. 169.

<sup>3</sup> *Bartlett v. Smith*, 11 M. & W. 483, 485-6, per Parke, B.; *Cleave v. Jones*, 7 Exch. 421; *Bennison v. Jewison*, 12 Jur. 485; *Doe d. Jenkins v. Davies*, 10 Q. B. 314; *Corfield v. Parsons*, 1 Cr. & M. 730; *Welstead v. Levy*, 1 Moo. & R. 138; *Boyle v. Wiseman*, 11 Exch. 360.

<sup>4</sup> *Bennison v. Jewison*, 12 Jur. 485, per Alderson, B.

<sup>5</sup> *Bartlett v. Smith*, 11 M. & W. 483, 486, per Parke, B.; *R. v. Hill*, 2 Den. C. C. 254.

<sup>6</sup> *R. v. Warringham*, 2 Den. C. C. 447, note; 15 Jur. 318.

<sup>7</sup> *Reg. v. Jenkins*, L. Rep., 1 C. C. 187; *Bartlett v. Smith*, 11 M. & W. 483, 486, per Parke, B.; *Bennison v. Jewison*, 12 Jur. 485, per Alderson, B.

that, for the purpose of determining such collateral questions, the judge is not restricted to *legal* evidence.<sup>1</sup> 2ndly. The jury thus far *incidentally* determine the law, that their verdict is usually general, *i. e.*, guilty, or not guilty, for the plaintiff, or for the defendant—such a verdict being manifestly compounded of the facts and the law as applicable to them. And although the jury have always a right to find a verdict in this form, yet, if they feel any doubt about the law, or distrust their own powers of applying it, they may find the facts specially, and leave the court to pronounce judgment according to law on the whole matter.<sup>2</sup>

#### 5. *Principles on which it is founded.*

§ 83. Having given this sketch of the course of “trial by judge and jury,” we should here dismiss the subject, were not a clear perception of the principles on which it is founded indispensable to a right understanding of our rules of judicial evidence. Looking at the different sorts of tribunals which have existed in different ages and countries, we shall find this distinction running \*through them, viz., that some are *fixed* and some *casual*.<sup>3</sup> By “fixed” tribunals are meant those [\* 107] composed of persons appointed, either permanently or for a definite time, to take cognizance of causes of a specified kind; and they most usually consist of men who have made legal matters the subject either of their study or practice: “casual,” are when the tribunal is called

<sup>1</sup> *Duke of Beaufort v. Cranshaw*, H. & R. 638, and the authorities there referred to.

<sup>2</sup> See on this subject, Litt. sects. 366, 367, 368; Co. Litt. 226 b, and 228 a; Hargrave’s note (5) to Co. Litt. 155 b; Finch, Law, 399; 3 Blackst. Com. 377, 378; 4 Id. 361; and 32 Geo. 3, c. 60.

<sup>3</sup> Paley’s Moral and Political Philosophy, bk. 6, ch. 8.

together for the occasion and dismissed when the cause is decided; and properly should consist of private individuals possessed of no peculiar legal knowledge. Now each of these has its advantages and disadvantages. For the decision of questions of *abstract law* the superiority of the fixed tribunals is too obvious to need remark; and even for questions of *fact* a superior education, and most probably higher order of intellect, and a practical acquaintance from the experience of years with men in general, with the tricks of witnesses, and the sophistries of advocates, might seem at first sight almost equally decisive in its favor. To this may be added, that the single judge seems the natural and [\*108] primitive form of tribunal,<sup>1</sup> as autocracy seems \*the natural and primitive form of government. But.

<sup>1</sup> Whether it is the most *general* may be questioned. In the early stages of society, and indeed in all countries on peculiar emergencies, causes are decided by persons of station and authority, without reference to any supposed special qualification on their part: it is only as civilization advances and laws become more complicated, that the study and application of them assumes the form of a distinct profession. Among the Jews, criminal cases, at least, were tried by the elders of the city at its gate. See Deut. xxi. 19, &c., xxii. 15, xxv. 7; Ruth, iv. 1-11; Josh. xx. 4; Jerem. xxvi. 10, &c.; Amos, v. 10-15, &c. And the practice of the two greatest nations of antiquity is thus stated by one of the greatest historians. "The free citizens of Athens and Rome enjoyed, in all criminal cases, the invaluable privilege of being tried by their country.

\* \* \* The task of convening the citizens for the trial of each offender became more difficult, as the citizens and the offenders continually multiplied; and the ready expedient was adopted of delegating the jurisdiction of the people to the ordinary magistrates, or to extraordinary *inquisitors*. In the first ages these questions were rare and occasional. In the beginning of the seventh century of Rome they were made perpetual. \* \* \* By these *inquisitors* the trial was prepared and directed; but they could only pronounce the sentence of the majority of *judges*, who with some truth, and more prejudice, have been compared to the English juries. To discharge this important though burdensome office, an annual list of ancient and respectable citizens was formed by the prætor. After many constitutional struggles, they were chosen in equal numbers from the senate, the equestrian order, and the people; four hundred and fifty were appointed for single questions; and the



as was said by the great Athenian legislator with reference to the latter; "Absolute monarchy is a fair field, but it has no outlet,"<sup>1</sup> so the evils necessarily incident \*to the former immensely outweigh its value. [ \* 109 ] Even as regards accuracy of decision, the advance in deciding facts is on the side of the casual tribunal. From their position in life its members are likely to know more of the parties and witnesses, and are consequently better able to enter into their views and motives; and from the novelty of their situation they bring a freshness

various rolls or *decurias* of judges must have contained the names of some thousand Romans, who represented the judicial authority of the state. In each particular cause, a sufficient number was drawn from the urn; their integrity was guarded by an oath; the mode of ballot secured their independence; the suspicion of partiality was removed by the mutual challenges of the accuser and defendant. \* \* \* In his civil jurisdiction, the prætor of the city was truly a judge, and almost a legislator; but as soon as he had prescribed the action of law, he often referred to a delegate the determination of the fact. \* \* \* But whether he acted alone, or with the advice of his council, the most absolute powers might be trusted to a magistrate who was annually chosen by the votes of the people. The rules and precautions of freedom have required some explanation; the order of despotism is simple and inanimate. Before the age of Justinian, or perhaps of Diocletian, the *decurias* of Roman judges had sunk to an empty title; the humble advice of the assessors might be accepted or despised; and in each tribunal the civil and criminal jurisdiction was administered by a single magistrate, who was raised and disgraced by the will of the emperor." Gibbon, *Decline and Fall of the Roman Empire*, ch. 44, *vers. finem*. See also Heinec. ad Pand. pars 2, § 2; Plutarch in Vit. Solon. The ancient Germans appear to have had a system strongly resembling our own (Savigny, *Gesch. des Römischen Rechts im Mittelalter*, 1 Band, 4 Kap.; Id. *System des heutigen Römischen Rechts*, 1 Buch, 3 Kap.; Colquhoun's *Summary of the Roman Civil Law*, pt. 1, § 119; and it seems that, for the mode of trial by a single judge, so long prevalent on the continent of Europe, we are chiefly indebted to the lower empire, whose practice the civilians and canonists copied, perhaps extended, in preference to that of Athens, and of Rome before she lost her liberties.

<sup>1</sup> *Πρὸς τὰς φίλας εἶπεν (ὡς λέγεται) καλὸν μὲν εἶναι τὴν τυραννίδα χωρίον, οὐκ, ἔχειν δὲ ἀπόβασιν.* Plutarch. in Vit. Solon.

<sup>2</sup> In modern times it has been compared to a high pressure steam engine without a safety valve. See letter signed "an Hertfordshire Incumbent," *Times*, June 23, 1860.

and earnestness to the inquiry, which the constant habit of deciding, adjudicating, and punishing fades and blunts more or less in the mind of every judge. But the great danger of a fixed tribunal is methodical or artificial decision—a sort of decision by routine, arising out of the faculty of generalizing, classifying, and distinguishing, which is so valuable in the investigation of questions of mere law. This is thus clearly stated by the Marquis Beccaria, whose testimony is the more valuable from being that of a foreigner.<sup>1</sup> “I deem that the best judicial system which associates with the principal judges assessors, not selected, but chosen by lot; for in such matters ignorance which judges by sense is safer than science which judges by opinion. Where the law is clear and precise, the duty of the tribunal is limited to ascertaining the existence of facts; and although, in seeking [ \* 110 ] the proofs of crime, ability and dexterity are \*required; although, in summing up the result of those proofs, perspicuity and precision are indispensable; still, in order to draw a conclusion from them, nothing more is required than plain ordinary good sense—less fallacious than the learning of a judge accustomed to seek the proofs of guilt, and who reduces every thing to an artificial system formed by study.” And here it is

<sup>1</sup> “Io credo ottima legge quella, che stabilisce assessori al giudice principale, presi dalla sorte, e non dalla scelta; perchè in questo caso è più sicura l'ignoranza che giudica per sentimento, che la scienza che giudica per opinione. Dove le leggi sono chiare e precise, l'ufficio di un giudice non consiste in altro che di accertare un fatto. Se nel cercare le prove di un delitto richiedesi abilità e destrezza, se nel presentarne il risultato è necessario chiarezza e precisione; per giudicarne dal risultato medesimo, non vi si richiede che un semplice ed ordinario buon senso, meno fallace che il sapere di un giudice assuefatto a voler trovar rei, e che tutto riduce ad un sistema fattizio adottato da' suoi studj.” Beccaria, *Dei Delitti e delle Pene*, § 7. See also the observations of Abbott, C. J., in *R. v. Burdett*, 4 B. & A. 95, 162, and Paley's *Moral and Political Philosophy*, bk. 6, ch. 8.

essential to remember that the consequences of the errors of the casual tribunal are immensely less. Theirs are mostly errors of *impulse*, and their consequences almost entirely confined to the actual case in which they are committed. The errors of a fixed tribunal, on the contrary, are the errors of *system*, and their effects lasting and general. Their decisions, proceeding as they do from persons in authority, will, especially if ever so slightly involving a point of law, be reported, or, what is even more objectionable, remembered without being reported, and form precedents by which future tribunals will be swayed. Nor is even this the worst — the judge to whom the precedent made by his predecessor is cited is safe from censure if he follows it, while, on the other hand, being erroneous in itself, he may without danger disregard it: so that, if corrupt or prejudiced, he may take as his guide either the true principles of proof or the previous wrong decision, and thus give judgment for the plaintiff or for the defendant at pleasure.<sup>1</sup>

§ 84. But the invincible objection to fixed tribunals, — *i. e.*, fixed tribunals intrusted to decide both law and facts, — exists in the difficulty, not to say impossibility, of keeping them pure, when the questions at issue are of great weight and importance. The judge's name, being known to the world, indicates to the evil-disposed litigant the person to whom his bribe can be offered, or \*on whose mind influence may be brought to [ \* 111 ] bear; and a frightful temptation is held out to the executive to secure the condemnation of political enemies, by placing on the seat of justice persons of complying morals or timorous dispositions. We com-

<sup>1</sup> Introd. § 74.

monly hear the purity of the British bench ascribed exclusively, or nearly so, to the statutes 12 & 13 Will. 3, c. 2, s. 3, and 1 Geo. 3, c. 23, which rendered judges irremovable at the pleasure of the crown; not remembering that, however valuable those enactments are on many grounds, *appointment* to the bench is as much in the hands of the crown as ever it was; and that even under the old system men were found, like Gascoigne, Hale, and others, who defied it when in the discharge of their duty. But where, as among us, the ultimate fate of every case is pronounced by a body the individual members of which are unknown until the moment of trial, all this is removed; and in modern times it is the packed jury, not the corrupt judge, which upright citizens have to dread.

§ 85. The description already given of our common law tribunal shows it to be one of a compound nature — partly fixed and partly casual — and which will be found so constructed as to secure very nearly all the advantages of each of the opposing systems, while it avoids their characteristic dangers.<sup>1</sup> By confiding to the judge the decision of all questions of law and practice, it secures the law and the practice from being altered by any mistake, or even misconduct, of the jury; by treating as matter of law, and consequently within his province, the admissibility of evidence, and the sufficiency as a legal basis of adjudication of any that may be received, it prevents the jury from acting without evidence, or on illegal evidence; and by intrusting him with the general oversight of the proceedings and the

<sup>1</sup> Paley's Moral and Political Philosophy, bk. 6, ch. 8.

duty of commenting upon the evidence, reaps [ \* 112 ] the benefit of his knowledge and experience. But by taking out of his hands the actual decision on the facts and the application of the law to them, it cuts up mechanical decision by the roots, prevents artificial systems of proof from forming, and secures the other advantages of a casual tribunal. Besides, the difference that exists between the judge and jury in station, acquirements, habits and manner of viewing things, not only enables them to exert on each other a mutual and very salutary control, but confers an enormous moral weight on their joint action. When, for instance, the condemnation of a criminal is pronounced both by the representative of the law and a number of persons chosen indifferently from the body of the community, the blow descends on him and the other evil-disposed members of it with a force which it never could have, if based solely on the reasoning of the one, or the consultation of the other. To these considerations must be added the constitutional protection which the presence of a jury affords to the free citizen—a matter too well known to need much explanation. Suffice it to say that it rests on the principle—a principle by no means peculiar to us<sup>1</sup>—of leaving a portion of the judicial authority in the hands of the people, instead of vesting the whole in some exclusive or professional body. Now it is one of the popular fallacies of the day—one which is frequently put forward, and still more frequently insinuated, by the enemies of the jury system, and too often incautiously admitted by its friends—that that constitutional protection is the sole advantage of this mode of trial, and that that protection is required in criminal cases only. The law of England,

<sup>1</sup> See *suprà*, p. 132, § 83, note 1.

however, as we trust will appear from what has been already said, has established the trial by judge and jury, in the conviction that it is the mode best calculated to [ \* 113 ] \*ascertain the truth, and do the greatest amount of justice, in every sense of that word, in the great majority of cases ; the constitutional protection afforded by it being only a collateral, although most important, consequence of the general arrangement. So obvious is this that some of those who have attacked the jury system in the main, concede that it ought to be retained in cases where the liberty of the subject may come in question.<sup>1</sup> But who could define beforehand what those cases are ? The most ordinary case, criminal or civil, may disclose in its progress a most important constitutional question, wholly imperceptible at its outset ; and we may add by way of illustration, that two of the most important constitutional questions that ever presented themselves to a tribunal were raised, one in a special action on the case,<sup>2</sup> the other in an action for libel.<sup>3</sup> “The distinction,” says an eminent jurist of the last century, “between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries.”<sup>4</sup>

<sup>1</sup> Bentham's *Principles of Judicial Procedure*, ch. 23, § 1.

<sup>2</sup> *Ashby v. White*, *Ld. Raym.* 938.

<sup>3</sup> *Stockdale v. Hansard*, 9 *A. & E.* 1.

<sup>4</sup> *Hargrave's Co. Lit.* 155 b, note 5.

6. *Rules regulating the admissibility of evidence — Evidence in causâ — Evidence extrâ causam — Rules of forensic proof.*

§ 86. 3. We come to the third great feature of the common-law mode of proof—the general principles by which the admissibility of evidence is governed. And here it is to be observed that the rules of evidence are of three kinds: 1st. Those which relate to evidence *in causâ*, *i. e.*, evidence adduced to prove the questions in dispute. 2nd. Those affecting evidence *extrâ causam*, or that which is only used to test the accuracy of media of proof. 3rd. Rules of forensic practice respecting evidence. Now it is to the first of these that the term \**“Rules of evidence”* most properly applies— [ \* 114 ] much evidence which would be rejected if tendered in *causâ*, being perfectly receivable as evidence *extrâ causam*; and there are few trials in which this sort of evidence does not play an important part. Again, the judge has a certain latitude allowed him with respect to the rules of forensic proof. He may ask any questions, in any form, and at any stage of the cause, and to a certain extent even allow parties or their advocates to do so. This does not mean that he can receive illegal evidence at pleasure; for if such be left to the jury a new trial will be granted, even though the evidence were extracted by questions put from the bench; but it is a power necessary to prevent justice being defeated by technicality, to secure indicative evidence,<sup>1</sup> and in criminal cases to assist in fixing the amount of punishment. And it should be exercised with due discretion. “*Discretio est discer-*

<sup>1</sup> For “indicative” evidence, see *infra*

nere *per legem*, quid sit justum :”<sup>1</sup> “In maximá potentiâ minima licentia :”<sup>2</sup> “Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colorable glosses and pretenses, and not to do according to their wills and private affections.”<sup>3</sup>

*One general rule of evidence in causâ—The best evidence must be given—This rule very often misunderstood.*

§ 87. Confining our attention therefore to evidence *in causâ*—it was said by a most eminent judge in a most important case, that “The judges and sages of the law have laid it down that there is but ONE GENERAL RULE OF EVIDENCE, *the best that the nature of the case will admit.*”<sup>4</sup> And Lord Chief Baron Gilbert, to whom principally we are indebted for reducing our law of evidence \*into a system, says, “The first and most [ \* 115 ] signal rule, in relation to evidence, is this, that a man must have the utmost evidence, the nature of the fact is capable of :”<sup>5</sup> “the true meaning of the rule of law, that requires the greatest evidence that the nature of the thing is capable of, is this : That no such evidence shall be brought, which *ex naturâ rei* supposes still a greater evidence behind in the party’s own possession and power.”<sup>6</sup> And in another old work of authority : “It seems in regard to evidence to be an uncontestable rule, that the party, who is to prove any fact, must do

<sup>1</sup> Co. Litt. 227 b ; 2 Inst. 56 ; 4 Inst. 41 ; 6 Q. B. 700.

<sup>2</sup> Hob. 159.

<sup>3</sup> 5 Co. 100 a. See, also, 7 Co. *Calvin’s case*, 27 a, and 10 Co. 140 a ; 19 How. St. Tr. 1089 ; 4 Burr. 2539.

<sup>4</sup> Lord Hardwicke, Ch., in *Omychund v. Barker*, 1 Atk. 21, 49.

<sup>5</sup> Gilb. Ev. 4, 4th Ed.

<sup>6</sup> Gilb. Ev. 16, 4th Ed.

<sup>7</sup> Bac. Abr. Evid. I. Ed. 1736.



it by the *highest* evidence of which the nature of the thing is capable." Similar language is to be found in most of our modern books.<sup>1</sup> The important rule in question has, however, been very often misunderstood; partly from the ambiguous nature of the language in which it is enunciated, and partly from its being commonly accompanied by an illustration which has been confounded with the rule itself. "If," says Lord Chief Baron Gilbert,<sup>2</sup> "a man offers a copy of a deed or will where he ought to produce the original, this carries a presumption with it that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore the proof of a copy in this case is not evidence." This is undoubtedly true, but it is a great mistake to suppose it the full extent of the rule—"Exempla illustrant non restringunt legem."<sup>3</sup> Sometimes, again, it has been misunderstood as implying that the law requires in every case the most convincing or credible evidence which could be produced under the circumstances. But all the authorities agree that this is not its meaning;<sup>4</sup> \*as further appears from the maxims, that "there are no degrees of parol [ \* 116 ] evidence," and "there are no degrees of secondary evidence." Suppose an indictment for an assault: or, to make the case stronger, for wounding with intent to murder (an offense capital until the 24 & 25 Vict. c. 100, and still punishable with penal servitude for life): the injured party, though present in court, is not called as a witness, and it is proposed to prove the charge by the

<sup>1</sup> 3 Blackst. Comm. 368; B. N. P. 293; Peake's Ev. 8; 2 Evans' Poth. 147-148;  
<sup>1</sup> Greenl. Ev. § 82, 7th Ed., &c.

<sup>2</sup> Gilb. Ev. 16, 4th Ed.

<sup>3</sup> Co. Litt. 24 a.

<sup>4</sup> See the authorities in note 1.

evidence of a person who witnessed the transaction at the distance of a mile, or even through a telescope; this evidence would be *admissible*, because it is connected with the act—the senses of the witness having been brought to bear upon it; and the not producing, what would probably be more satisfactory, the evidence of the party injured, is mere matter of observation to be addressed to the jury. Again, by “secondary evidence” is meant derivative evidence of the contents of a written document; and it is a principle that such is not receivable unless the absence of the “primary evidence,” the document itself, is satisfactorily accounted for.<sup>1</sup> But when this has been done, any form of secondary evidence is receivable:<sup>2</sup> thus, the parol evidence of a witness is admissible though there is a copy of the document, and the probability that it would be more trustworthy than his memory is only matter of observation.<sup>3</sup>

1. *Three chief applications of it—Judge and jury must not decide facts on their personal knowledge.*

§ 88. The true meaning of this fundamental principle will be best understood by considering the *three* chief applications of it. Evidence, in order to be receivable, should come through proper instruments, and be in general original, and proximate. With respect to the first of these: with the exception of a few matters which either the law notices judicially, or are deemed too notorious \*to require proof, the judge and jury [ \* 117 ] must not decide facts on their personal knowledge; and should be in a state of legal ignorance of every

<sup>1</sup> *Infra*, bk. 3, pt. 2, ch. 3.

<sup>3</sup> *Id.* 106, 107.

<sup>2</sup> *Doe d. Gilbert v. Ross*, 7 M. & W. 102.

thing relating to the questions in dispute before them, until established by legal evidence, or legitimate inference from it.<sup>1</sup> “Non refert quid notum sit judici, si notum non sit in formâ judicii.” It is obvious that if they were allowed to decide on impressions, or on information acquired elsewhere, not only would it be impossible for a superior tribunal, the parties, or the public, to know on what grounds the decision proceeded, but it might be founded on common rumor or other forms of evidence, the very worst instead of the best.

## 2. *Exaction of original and rejection of derivative evidence.*

§ 89. The next branch of this rule is that which exacts original and rejects derivative evidence — that no evidence shall be received which shows on its face that it only derives its force from some other which is withheld.<sup>2</sup> “Melius (or ‘satiùs’) est petere fontes quàm sectari rivulos.”<sup>3</sup> The terms “primary” and “secondary” evidence are used by our law in the limited sense of the original and derivative evidence of written documents; the latter of which is receivable when, by credible testimony, the existence of the primary source has been established and its absence explained. But derivative evidence of other forms of original evidence is in general rejected absolutely; as where supposed oral evidence is delivered through oral, and the various other sorts of evidence comprised

<sup>1</sup> *Infra*, bk. 3, pt. 1, ch. 1; *Intro.* § 38.

<sup>2</sup> 3 *Bulst.* 115.

<sup>3</sup> 3 *Per Parke, B.*, in delivering the judgment of the Court of Exchequer in *Doe d. Welsh v. Langfield*, MS. Hil. Vac. 1847, reported 16 *M. & W.* 497; *Doe d. Gilbert v. Ross*, 7 *M. & W.* 102, 106, *per Parke, B.*; *Macdonnell v. Evans*, 11 *C. B.* 930, 942, *per Maule, J.*

<sup>4</sup> *Co. Litt.* 305 b; 8 *Co.* 116 b; 10 *Co.* 41 a.

in practice under the very inadequate phrase "hearsay evidence."<sup>1</sup>

3. *There must be an open and visible connection between the principal and the evidentiary facts.*

[ \* 118 ] \*§ 90. The remaining application of this great principle which we propose to notice at present seems based on the maxim, "In jure non remota causa, sed proxima spectatur."<sup>2</sup> It may be stated thus, that, as a condition precedent to the *admissibility* of evidence, either direct or circumstantial, the law requires *an open and visible connection* between the principal and evidentiary facts, whether they be ultimate or subalternate. This does not mean a *necessary* connection—that would exclude all presumptive evidence—but such as is reasonable, and not latent or conjectural. In this our judicial evidence partakes of the very essence of all sound municipal law, and preserves the lives, liberties and properties of men, by placing an effectual rein on the imagination of those intrusted with the administration of justice, and preventing decision on remote inferences and fancied analogies.<sup>3</sup>

§ 91. The true character and value of the important principle now under consideration is, however, more easily conceived than described. In dealing with natural evidence the connection between the principal and evidentiary facts must be left to instinct;<sup>4</sup> in legal evidence this is replaced by a sort of legal instinct, or legal sense, acquired by practice; and the old observation

<sup>1</sup> *Infra*, bk. 3, pt. 2, ch. 4.

<sup>2</sup> Bac. Max. of the Law, Reg. 1; 12 East, 652; 14 M. & W. 483; 6 B. & S. 881; H. & R. 61; 18 C. B. 379; 18 Jur. 962.

<sup>3</sup> *Intro.* § 38.

<sup>4</sup> 1 Benth. Jud. Ev. 44.

"Multa multò exercitamentis facilius quàm regulis percipies"<sup>1</sup> becomes perfectly applicable. A few instances, however, may serve to illustrate. On a criminal trial the confession of a third party, not produced as a witness, that he was the real criminal and the accused innocent, although certainly not destitute of natural weight, would be rejected, from its remoteness and want of connection with the accused, and the manifest danger of collusion and fabrication. So, if a man \* writes in his pocket-book that he owes me 5*l.*, [ \* 119 ] it is reasonable evidence against him that he owes me that sum, although it is quite possible he may be mistaken. But suppose he were to write in it that I owe him 5*l.*, that statement, though possibly quite true, is no evidence against me, for the want of connection is obvious. Again, the bad character or reputation of an accused person, although strong moral, is not legal evidence against him, unless he sets up his character as a defense to the charge.<sup>2</sup> The sound policy which requires that even the worst criminals shall receive a fair and unprejudiced trial renders this rule indispensable. So, a man's appearance and physiognomy are not unfrequently excellent guides to his character and disposition, but they ought not to be, and they are not receivable as legal evidence against him.<sup>3</sup>

§ 92. But whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial,

<sup>1</sup> 4 Inst. 50.

<sup>2</sup> See this subject very fully considered, in *Reg. v. Rowton*, 34 L. J., M. C. 57.

<sup>3</sup> Some of the French lawyers thought they ought, "On allait jusqu'à mettre au nombre de ces indices" (*i. e.*, indices éloignés) "*la mauvaise physiognomie de l'accusé, ou le vilain nom qu'il portait*. Mais c'étaient là, il faut en convenir, des indices très-éloignés." Bonnier, *Traité des Preuves*, § 652.

or rejected as conjectural evidence, is often a question of extreme difficulty. One test, perhaps, is to consider whether any imaginable number of pieces of evidence—such as that tendered—could be made the ground of decision: for it is the property of a chain of genuine circumstantial evidence, that, however inconclusive each link is in itself, the concurrence of all the links may amount to proof, often of the most convincing kind. Suppose, in a case of murder by a cutting instrument, no eye-witness being forthcoming, the criminative facts against the accused<sup>1</sup> were: 1. He had had a quarrel [\* 120] \*with the deceased a short time previous. 2. He had been heard to declare that he would be revenged on the deceased. 3. A few days before the murder the accused bought a sword or large knife, which was found near the corpse. 4. Shortly after the murder he was seen at a short distance from the spot, and coming away from it. 5. Marks corresponding with the impressions made by his shoes were traceable near the body. 6. Blood was found on his person soon after the murder. 7. He absented himself from his home immediately after it. 8. He gave inconsistent accounts of where he was on the day it took place. The weakness of any one of these elements, *taken singly*, is obvious, but collectively they form a very strong case against the accused. Now, suppose, instead of the above chain of facts, the following evidence was offered. 1. The accused was a man of bad character. 2. He belonged to a people notoriously reckless of human life, and addicted to assassination. 3. On a former occasion he narrowly escaped being convicted for the murder of another person. 4. Much jealousy and ill feeling existed between his nation and that to which

<sup>1</sup> This expression is used in 11 & 12 Vict. c. 46, s. 1; 30 & 31 Vict. c. 35, s. 6.

the deceased belonged. 5. On the same spot, a year before, one of the latter was murdered by one of the former in exactly the same way. 6. The murderer had also robbed the deceased, and the accused was well known to be avaricious. 7. He had been overheard in his sleep to use language implying that he was the murderer.<sup>1</sup> 8. All his neighbors believed him guilty, or, supposing the case one of public interest, both houses of parliament had voted addresses to the crown in which he was assumed to be the guilty party. These and similar matters, however multiplied, could never generate that rational conviction on which alone it is safe to act, and accordingly not one of them would be received as legal evidence. *It*

*Indicative evidence.*

§ 93. It may be objected, and, indeed, Bentham's Treatise on Judicial Evidence is founded [ \* 121 ] on the notion, that by exclusionary rules like the above, much valuable evidence is wholly sacrificed.<sup>2</sup> Were such even the fact, the evil would be far outweighed by the reasons already assigned for imposing a limit to the discretion of tribunals in declaring matters proved or disproved:<sup>3</sup> but when the matter comes to be carefully examined, it will be found that the evidence in question need seldom be lost to justice; for however dangerous and unsatisfactory it would be as the basis of final adjudication, it is often highly valuable as "indicative evidence," *i. e.*, evidence not in itself receivable but which is "*indicative*" of better.<sup>4</sup> Take the case of derivative

<sup>1</sup> *Infra*, bk. 3, pt. 2, ch. 7.

<sup>2</sup> See that work, *passim*.

<sup>3</sup> *Supra*, § 90, and *Intro.* § 38.

<sup>4</sup> The phrase "indicative evidence" is used in this sense by Bentham, 1 *Jud. Ev.* 37, and bk. 6, ch. 11, sect. 4, as well as in his "*Principles of Judicial Pro-*

evidence — a witness offers to relate something told him by A.; this would be stopped by the court; but he has indicated a genuine source of testimony, A., who may be called or sent for. So a confession of guilt which has been made under undue promise of favor or threat of punishment is inadmissible by law, yet any facts discovered in consequence of that confession, such, for instance, as the finding of stolen property, are good legal evidence. Again, no one would think of treating an anonymous letter as legal evidence against a party not suspected of being its author, yet the suggestions contained in such letters have occasionally led to disclosures of importance. In tracing the perpetrators of crimes, also, conjectural evidence is often of the utmost importance, and leads to proofs of the most satisfactory kind, sometimes even amounting to demonstration. It is chiefly, however, on \*inquisitorial proceedings— [ \* 122 ] such as coroners' inquests, inquiries by justices of the peace before whom persons are charged with offenses, and the like—that the use of "indicative evidence" is most apparent: though even these tribunals cannot act on it.

*The rules of evidence are in general the same in civil and criminal proceedings.*

§ 94. The rules of evidence are in general the same in civil and criminal proceedings;<sup>1</sup> and bind alike crown and subject, prosecutor and accused, plaintiff and de-

cedure, &c." ch. 11, sects. 1 and 3. In one place he calls it "Evidence of evidence," 3 Jud. Ev. 554.

<sup>1</sup> *R. v. Lockhart*, 2 East, P. C. 658; *R. v. Warickshall*, 1 Leach, C. L. 263; *R. v. Gould*, 9 C. & P. 364; *R. v. Griffin*, R. & R. C. C. 151.

<sup>2</sup> *R. v. Burdett*, 4 B. & A. 95, 122, per Best, J.; *Attorney-General v. Le Merchant*, 2 T. R. 201, n.; *R. v. Murphy*, 8 C. & P. 297, 306; *Leach v. Simpson*, 5 M. & W. 309, 312, per Parke, B.; 25 Ho. St. Tr. 1314; 29 Id. 764.



fendant, counsel and client. There are, however, some exceptions. Thus the doctrine of estoppel has a much larger operation in the former.<sup>1</sup> So an accused person may, at least if undefended by counsel, rest his defense on his own unsupported statement of facts, and the jury may weigh the credit due to that statement;<sup>2</sup> whereas in civil cases nothing must be opened to the jury which it is not intended to substantiate by proof.<sup>3</sup> Again, confessions or other self-disserving statements of prisoners will be rejected if made under the influence of undue promises of favor, or threats of punishment;<sup>4</sup> but there is no such rule respecting similar statements in civil cases. So, although both these branches of the law have each their peculiar presumptions, still the technical rules regulating the burden of proof cannot be followed out in all their niceties when they press against accused persons.<sup>5</sup>

*Difference as to the effect of evidence in civil and criminal proceedings.*

§ 95. But there is a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. \*In the former, a mere preponderance of probability, due regard being had to the burden [ \* 123 ] of proof, is a sufficient basis of decision;<sup>6</sup> but in the latter, especially when the offense charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous con-

<sup>1</sup> *Infra*, bk. 3, pt. 2, ch. 7.

<sup>2</sup> *Infra*, bk. 4, pt. 1.

<sup>3</sup> *Stevens v. Webb*, 7 C. & P. 60, 61; *Duncombe v. Daniell*, 8 Id. 222, 227.

<sup>4</sup> *Infra*, bk. 3, pt. 2, ch. 7.

<sup>5</sup> Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16. See per Lord Kenyon, C. J., in *R. v. Hadfield*, 27 Ho. St. Tr. 1353.

<sup>6</sup> Plowd. 412; 1 Greenl. Ev. 13 a, 7th Ed.; Mac Nally's Ev. 578; *Cooper v. Slade*, 6 Ho. Lo. Cas. 772, per Willes, J.

demnation both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty;<sup>1</sup> or, as an eminent judge expressed it, "Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt."<sup>2</sup> The expression "moral certainty" is here used in contradistinction to physical certainty, or certainty properly so called;<sup>3</sup> for the physical possibility of the innocence of any accused person can never be excluded. Take the strongest case,—a number of witnesses of character and reputation, and whose evidence is in all respects consistent, depose to having seen the accused do the act with which he is charged, still the jury only believe his guilt on two presumptions, either or both of which may be fallacious, viz.: that the witnesses are neither deceived themselves nor deceiving them;<sup>4</sup> and the freest and fullest confessions of guilt have occasionally turned out untrue.<sup>5</sup> Even if the jury were themselves [ \* 124 ] the witnesses, there \*would still remain the question of the identity of the person whom they saw do the deed with the person brought before them accused of it;<sup>6</sup> and identity of person is a subject

<sup>1</sup> See *Intro.* § 49. The juror's oath seems framed with a view to the above distinction. In civil cases he is sworn "well and truly to try the issue joined between the parties, &c.," whilst in treason or felony his oath is that he "shall well and truly try, and true deliverance make, between our sovereign lady the Queen and the prisoner at the bar, &c."

<sup>2</sup> Parke, B., in *R. v. Sterne*, *Surrey Sum. Ass.* 1843, MS.

<sup>3</sup> *Intro.* § 6.

<sup>4</sup> Domat, *Lois Civ.* pt. 1, liv. 3, tit. 6, *Préamb.*; 2 *Ev.* Poth. 332, *Rosc. Civ. Ev.* 25, 9th Ed.

<sup>5</sup> *Infra*, bk. 3, pt. ch. 7.

<sup>6</sup> See *M.* 49 *Hen. VI.* 19 *B.* pl. 26.

on which many mistakes have been made.<sup>1</sup> The wise and humane maxims of law, that it is safer to err in acquitting than condemning,<sup>2</sup> and that it is better that many guilty persons should escape than one innocent person suffer,<sup>3</sup> are, however, often perverted to justify the acquittal of persons of whose guilt no *reasonable* doubt could exist; and there are other maxims which should not be forgotten, "Interest reipublicæ ne maleficia remaneant impunita,"<sup>4</sup> "Minatur innocentes qui parcit nocentibus."<sup>5</sup>

§ 96. Again, the psychological question of the *intent* with which acts are done, plays a much greater part in criminal than in civil proceedings. The maxim "Actus non facit reum, nisi mens sit rea,"<sup>6</sup> runs through the criminal law, although in some instances a criminal intention is conclusively presumed from certain acts;<sup>7</sup> while in civil actions to recover damages for misconduct or neglect, it is in general no answer that the defendant did not intend mischief<sup>8</sup>—"Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus."<sup>9</sup> There are, however, exceptions to this, and whether an act was done *knowingly* often becomes an important consideration in civil suits.<sup>10</sup> It may

<sup>1</sup> *Infra*, bk. 3, pt. 2, ch. 6.

<sup>2</sup> 2 Hale, P. C. 290.

<sup>3</sup> 2 Hale, P. C. 289; 4 Blackst. Comm. 358.

<sup>4</sup> Jenk. Cent. 1, Cas. 59. See also 4 Co. 45 a.

<sup>5</sup> 4 Co. 45 a. See also Jenk. Cent. 3, Cas. 54.

<sup>6</sup> Co. Litt. 247 b; 3 Inst. 107; 4 How. St. Tr. 1403; T. Raym. 423; 7 T. R. 514; 2 East, 104; 1 Den. C. C. 389; 5 Jur., N. S. 649.

<sup>7</sup> *Infra*, bk. 3, pt. 2, ch. 2.

<sup>8</sup> M. 6 Edw. IV. 7 B. pl. 18; Hob. 134; T. Raym. 423; Willes, 581; 2 East, 104; 16 M. & W. 442.

<sup>9</sup> Bacon, Max. Reg. 7.

<sup>10</sup> 4 Co. 18 b; *May v. Burdett*, 9 Q. B. 101; *Jackson v. Smithson*, 15 M. & W. 563; *Card v. Case*, 5 C. B. 622; *Hudson v. Roberts*, 6 Exch. 697; *Worth v. Gilling*, L. R. 2 C. C. P. 1.

[ \* 125 ] \*be laid down as a general principle, that so as a man has a right by law to do an act, the intention with which he does it is immaterial.<sup>1</sup> “Nullus videtur dolo facere, qui suo jure utitur.”<sup>2</sup> All contracts, likewise, are founded on an intention of the parties, either expressed by themselves or implied by law from circumstances.

*How far the rules of evidence may be relaxed by consent.*

§ 97. And here a question presents itself, whether and how far the rules of evidence may be relaxed *by consent*? In criminal cases, at least in treason and felony, it is the duty of the judge to see that the accused is condemned according to law, and the rules of evidence forming part of that law; no admissions from him or his counsel will be received. On the other hand, however, much latitude in putting questions and making statements is given, de facto if not de jure, to prisoners who are undefended by counsel. So, no consent could procure the admission of evidence which public policy requires to be excluded; such as secrets of state and the like. Moreover, no admission at a trial will dispense with proof of the execution of certain attested instruments, though the instrument itself may be admitted before the trial with the view to save the trouble and expense of proving it.<sup>3</sup> Subject, however, to these and some other exceptions, the general principles, “Quilibet potest renunciare juri pro se introducto”<sup>4</sup> — “Omnis consensus tollit errorem”<sup>5</sup> — seem to apply to evidence in civil cases; and much inad-

<sup>1</sup> *Oakes v. Woods*, 2 M. & W. 791; *Simmons v. Lillystone*, 8 Exch. 431; *Ridgway v. The Hungerford Market Company*, 3 A. & E. 171.

<sup>2</sup> Dig. lib. 50, t. 17, l. 55.

<sup>3</sup> *Infrà*, bk. 3, pt. 2, ch. 7.

<sup>4</sup> Co. Litt. 99 a, 166 a, 228 b; 10 Co. 101 a; 2 Inst. 183; 4 Bl. Com. 316.

<sup>5</sup> Co. Litt. 126 a.

missible evidence is constantly received in practice, because the opposing counsel either deems it not worth while to object, \*or thinks its reception will be beneficial to his client. It has, however, been [ \* 126 ] held, that where a valid objection is taken to the admissibility of evidence it is discretionary with the judge whether he will allow the objection to be withdrawn.<sup>1</sup>

*Husband and wife, her testimony not admissible, though he consent.*

§ 98. Whether the rules respecting the incompetency of witnesses could be dispensed with by consent, seems never to have been settled. In *Pedley v. Wellesley*,<sup>2</sup> Best, C. J., said that Lord Mansfield once permitted a plaintiff to be examined with his own consent;<sup>3</sup> and although some of the judges doubted the propriety of that permission, he (the Chief Justice) thought it was right. In *Dewdney v. Palmer*,<sup>4</sup> where, after a witness had been sworn on behalf of the plaintiff, it was proposed to show by evidence that he was the real plaintiff, the judge refused to allow this course; and his ruling was affirmed by the Court of Exchequer, on the ground that the objection ought to have been taken on the voir dire; but in a subsequent case of *Jacobs v. Layborn*,<sup>5</sup> the same court, consisting of Lord Abinger, C. B., and Rolfe, B., overruled this, and held that objections to competency might be made at any stage

<sup>1</sup> *Barbat v. Allen*, 7 Exch. 609.

<sup>2</sup> 3 C. & P. 558.

<sup>3</sup> The case here referred to is thought to be *Norden v. Williamson*, 1 Taunt. 378, Lord Mansfield being put by mistake for C. J. Mansfield. See per Parke, B., in *Barbat v. Allen*, 7 Exch. 612.

<sup>4</sup> 4 M. & W. 664.

<sup>5</sup> 11 M. & W. 685. See, however, the observations of Parke, B., in *Yardley v. Arnold*, 10 M. & W. 145.

of the trial.<sup>1</sup> So, arbitrators are bound by the legal rules of evidence;\* yet on submissions to arbitration previous to the 14 & 15 Vict. c. 99, it was generally made part of the rule of court that the parties might [ \* 127 ] \*be examined as witnesses. In the case already cited of *Pedley v. Wellesley*,<sup>3</sup> a female was called as witness for the plaintiff, and it appeared that after being served with the subpoena she had married the defendant. On her evidence being objected to, it was replied that a party to a suit cannot by any act, laudable or otherwise, deprive his adversary of the testimony of his witness; but Best, C. J., said he should allow the witness to be examined if the defendant consented, not otherwise. In a much older case,<sup>4</sup> where it was proposed by a man's consent to examine his adversary's wife as a witness, Lord Hardwicke, C. J., said, "The reason<sup>5</sup> why the law will not suffer a wife to be a witness for or against her husband, is to preserve the peace of families, and therefore I shall never encourage such a consent;" and she was not examined.<sup>6</sup> Such evidence has been rejected in America, on the ground that the interest of the husband in preserving the confidence reposed in the wife is not the sole foundation of the rule; the public having also an interest in the preservation of domestic peace, which might be disturbed by her testimony notwithstanding his consent, and that there is a very great temptation to perjury in such cases.<sup>7</sup> To this latter argument it may be observed, that there is a much greater temptation

<sup>1</sup> See *R. v. Whitehead*, 35 L. J., M. C. 186.

<sup>2</sup> *Att.-Gen. v. Davison*, 1 M'Cl. & Y. 160; *Banks v. Banks*, 1 Gale, 46.

<sup>3</sup> 3 Car. & P. 558.

<sup>4</sup> *Barker v. Dixie*, Ca. temp. Hardw. 264.

<sup>5</sup> See on this subject, *infra*, bk. 2, pt. 1, ch. 2.

<sup>6</sup> *Tilton v. Beecher*, Brooklyn, N. Y. City Court, 1875.

<sup>7</sup> 1 Greenl. Ev. § 340, 7th Ed.

to perjury when an accomplice in a case of treason or felony is examined as a witness against his companions; or an heir apparent comes forward as a witness for his father, the title to whose lands is in question. (a)

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(a) The question as to whether a wife may testify for or against her husband, in cases in which she is not a competent witness, where both parties consent to her being used as a witness, is an open question, and has not been definitely settled either in the courts of this country or England. There are decisions both ways, but the balance, or rather the weight of authority, is against her being permitted to testify. The ground upon which the testimony of a wife is excluded is entirely distinct from that upon which the testimony of parties or interested persons is excluded. The exclusion of such evidence in the one case is to prevent perjury and false swearing, and to the same end in the other, with the additional purpose of preventing any disturbance of the marital relations, as would be likely to result if husband and wife might be used as witnesses for or against each other indiscriminately, or even at all, where their evidence involved any violation or exposure of the mutual confidences incident to the relation. Indeed, in all cases where, either by the rules of the common law, or by the express provisions of statutes, they are permitted to testify, it is only to general facts, and not such as grow out of their mutual confidence. With some few exceptions, the testimony of a wife has been held to be inadmissible either for or against him, even when no objection is interposed thereto, and where both parties have consented to her giving evidence. In *Barker v. Dixie*, *Ridgeway temp. Hardwicke*, 264, the question was raised directly, as stated in the text, and Lord Hardwicke refused to receive the evidence. Not because it would be error to do so, which an appellate court would correct, but because the practice would be destructive of the best interests of society, and would open up the door to a series of evils which it is the duty of courts to prevent. It is well said by the author in the text, that this is a matter which extends beyond the interests of the parties, and is beyond their control, because it affects the interests of the public. But, so far as the immediate rights of the parties to the suit are concerned, there can be no question but that they can waive any legal objection to the reception of such evidence, which will be binding and operative upon them, so far as the same affects their immediate rights. The matter, under such circumstances, rests in the sound discretion of the court, and few judges, I apprehend, will be found who will admit the evidence of husband or wife in actions in which either is a party, to matters that involve a violation of marital confidence.†

The case of *Pedley v. Wellesley*, 3 C. & P. 558, can in no sense be regarded as an authority in favor of a contrary rule, for the language of Best, C. J., was mere *dicta*, objection having been made to the evidence, and the case to which the learned judge referred, as an authority for the reception of such evidence by consent of the parties (*Norden v. Williamson*, 1 Taunt. 378), was not a par-

§ 99. All these cases took place before the 14 & 15 Vict. c. 99 had rendered the parties to a suit competent witnesses in general. After the passing of that statute,

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allel case. In that case, one of the plaintiffs was permitted, without objection, to testify, and Mansfield, C. J., said: "I know of no reason why, if the defendant is willing to admit him, and the plaintiff is willing to give evidence against himself, he should not be permitted to do so," and Chambre, J., said: "The defendant may waive the objection to the plaintiff's testimony if he will." But, in that case, the broad question of public policy, applying to the case of a husband or wife, was not involved, and the simple question was presented, whether a party could waive his right to object to inadmissible evidence, and the court very properly held that he could. As has previously been stated, there would seem to be no doubt that parties may waive all objections to the introduction of the evidence of a husband or wife, and that such waiver will be obligatory and binding upon them in the action; but the question reaches beyond the rights of the parties, and involves a question of public policy in which the public are interested, and which should always control the court in the exercise of its discretionary power.

In a recent case which has acquired a world-wide notoriety, *Tilton v. Beecher*, tried before Neilson, J., in the Brooklyn (N. Y.) circuit, which was an action for *crim. con.*, the plaintiff offered to allow the defendant to call his (the plaintiff's) wife as a witness. The defendant's counsel raised the point that the plaintiff could not waive the objection so as to make the evidence legally admissible, and the court so decided. Neilson, J., held that "the withdrawal by the plaintiff of all objection to the production of his wife as a witness against him, and his consent even to her being called to give her evidence upon the question of adulterous intercourse between herself and the defendant, did not remove the legal disability, or make her a competent or proper witness in the case." The foregoing is the *gist* of the decision of the court in the case, but the language, being gathered from a newspaper report, may not be identical with that used by the learned judge. The very evil which should be studiously avoided was presented in this case. The plaintiff must have known that his offer to admit the evidence of his wife would be rejected by the defendant; but the offer was made, and except for the interposition of the court, the fact that she was not produced would doubtless have been urged before the jury as evidencing the fact that he dare not produce her lest her evidence should establish his guilt.

In *Barbat v. Allen*, 7 Ex. 615, Pollock, C. B., in commenting upon the practice of admitting inadmissible evidence by consent, gave expression to what seems to me a very *sensible* and correct rule in reference to such questions: "In my opinion," says the learned judge, "a judge is bound to administer the whole law of evidence; and, although a practice has crept in of admitting inadmissible evidence by consent, still, *that is a matter for the discretion of the judge.* \* \* \* I think that the judge, in his discretion, has a



\*and previous to the 16 & 17 Vict. c. 83,<sup>1</sup> the question arose whether the wives of such par- [\* 128] ties were also rendered competent; which, after some

<sup>1</sup> Which rendered husbands and wives competent witnesses for or against each other in civil cases. See *infra*, bk 2, pt. 1, ch. 2.

right to insist on the law of England being administered; and when any departure from it is proposed, to say to the parties, 'You shall not make a law for yourselves.'"

In this case the defendants proposed to call the wife of one of the defendants to prove a material issue. The plaintiff objected, and the court sustained the objection. But after the court had ruled upon the objection, the plaintiff waived the objection and offered to allow the wife to testify, but the judge (Pollock, C. B.) refused to receive the evidence, and a verdict was found for the plaintiff, and it was upon a rule to show cause why the verdict should not be set aside for the refusal of the court to receive the evidence after the objection thereto was withdrawn, that the case was heard in Exchequer, and the court unanimously discharged the rule. Thus it will be seen that the reception of any inadmissible evidence, when objection to its admission is waived, is in the discretion of the court, and that error cannot be predicated of a refusal of the court to admit it.

In *Dwelly v. Dwelly*, 46 Me. 377, the question as to the admissibility of the evidence of husband and wife against each other in an action for a divorce, in which the one was plaintiff and the other defendant, came up, and even though the parties agreed that each might testify, the court rejected the evidence upon the ground that the common law excluded such evidence, not merely on the ground of interest, but upon a sound public policy, which parties could not set aside by waiver. See, also, *McKeen v. Frost*, 46 Me. 239.

But it would seem that the court merely intended to apply that rule in cases where the husband and wife were parties plaintiff and defendant, for in the same volume of reports, in the case of *Walker v. Sanborn*, 46 Me. 470, where the question of the admissibility of the evidence of the wife against the husband in a case where the facts to which she was to be called to testify were acquired through the confidence of the marital relations, the court held that the one could not testify against the other *without his or her consent*; but that as to all other matters, she may testify, in an action brought by her husband's executor upon an agreement, at the making of which she was present.

In *People v. Randall*, 5 City Hall Recorder (N. Y.), 154, the defendant was on trial for murder, and the defendant's wife was offered as a witness, but the court refused to receive the evidence, although both parties consented to her testifying, and the same course was adopted as to the evidence of a husband in *People v. Colbern*, 1 Wheeler's Cr. Cas. (N. Y.) 479, where the wife was jointly indicted with another, although the wife had never been arrested and the prosecuting attorney had entered a *nolle prosequi* as to her. In that case the court

conflict of opinion, was resolved in the negative.<sup>1</sup> In *Barbat v. Allen*,<sup>2</sup> the plaintiff's case having been proved by a witness, the defendants' counsel proposed to call the

<sup>1</sup> See *Stapleton v. Crofts*, 18 Q. B. 367; *Barbat v. Allen*, 7 Exch. 609, and *M'Neillie v. Acton*, 17 Jur. 661.

<sup>2</sup> 7 Exch. 609.

held that, although the wife was not on trial, and although the government had entered a *nol. pros.*, yet the interest of the wife in the issue still remained, because evidence might be elicited that would make it the duty of the court to issue a bench warrant for her.

And it would seem that the wife cannot be called as a witness for a third person who is indicted separately for the same offense for which her husband is also indicted, or for a co-respondent jointly indicted with her husband, when they have severed in their defenses and been allowed separate trials, when her evidence will in anywise tend to benefit or injure her husband. *People v. Bell*, 10 Johns. (N. Y.) 95; *Pullen v. People*, 1 Doug. (Mich.) 48. The reason for this rule is, that the husband has an interest in the issue, and even in suits between third persons when the husband is not a party of record, yet has an interest in the issue, she cannot be permitted to give evidence. But when the husband has been tried and acquitted, or has been convicted, either on trial or upon his own plea, the wife may be a witness for or against another person jointly indicted with him. *Re v. Williams*, 8 C. & P. 284; *Reg. v. Thompson*, 3 F. & F. 824; *Hawkesworth v. Shaler*, 12 M. & W. 94.

So, too, when the matter to which the husband or wife is called upon to testify involves no violation of marital confidence, and is a collateral matter which can neither be used for or against the other; that is, when the other will neither be benefited or injured by the evidence, either may be a witness for a person jointly indicted with the other when such person has a separate trial. *Com. v. Reid*, 8 Phila. (Penn.) 385. But the matter must be strictly collateral, or of a character such as in no event can prejudice or benefit the other. If the offense is necessarily joint, as for a conspiracy, the evidence is not admissible. *Com. v. Reid, ante*.

So, too, in New Jersey it is held that in collateral proceedings or suits between third persons, the husband or wife may not only be called to testify to matters that tend to criminate each other, but may also be called to impeach each other. *State v. Ware*, 35 N. J. 554; *State v. Wilson*, 2 Vroom (N. J.), 77; *Stewart v. Johnson*, 3 Harr. (N. J.) 87.

As illustrative of the rule in *Queen v. Bartlett*, 1 Cox's Cr. C. 105, the defendants were jointly indicted for stealing potatoes, and it appeared that some of the potatoes were found in the room of the husband and some in the room of the other, the court (Wightman, J.) admitted the wife of one of the prisoners to testify that the potatoes found in the room of the other were not the property of the prosecutor. The court hesitated considerably about admitting the

wife of one of the defendants, to prove fraud, by the admissions of that witness in her presence. The plaintiff's counsel objected, and Pollock, C. B., refused to admit her

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evidence, and expressed some doubt as to its admissibility, but finally admitted it upon the ground that the evidence would neither benefit nor injure the husband.

A similar rule was adopted in *Reg. v. Sills*, 1 Car. & Kir. 494, by Tindal, J., and the wife of one who was jointly indicted with her husband for stealing a quantity of cloaks, necklaces, work-boxes, &c., was admitted to testify for the other that he was not present at the larceny, and the admission of this evidence was predicated upon the same ground as in *Queen v. Bartlett*.

But if either is to derive any possible benefit from or is in anywise to be injured by the testimony of the other, the evidence is not admissible. Thus in *Queen v. Denslow*, 2 Cox's Cr. C. 230, the respondents were jointly indicted for horse stealing, and the prosecutor swore that both were present. One of the respondents called the wife of the other to prove that he was not there when the horses were stolen, but Williams, J., after advising with Cresswell, J., rejected the evidence upon the ground that the evidence of the wife would tend to benefit the husband, because it would tend to discredit the witness for the prosecution, and such, also, was the rule adopted in *Rex v. Smith*, 1 Moody's Cr. C. 289; *Bentley v. Cook*, 2 T. R. 268.

In *Rex v. All Saints, etc.*, 6 M. & S. 194, the question arose as to the right of the wife to testify in suits between third persons and collateral proceedings. The question arose upon the settlement of a pauper. The respondent called a woman to prove that at the time of the marriage of the alleged pauper to the man through whom she claimed a settlement, she—the witness—was the lawful wife of the man, having been married to him some time prior to said last marriage. The evidence was admitted, and the marriage of the pauper to the husband being subsequently proved by the testimony of the pauper and another witness, it was moved to set aside the verdict on the ground that the first wife was not a competent witness to prove the first marriage. But the court refused to disturb the verdict, on the ground that the husband not being a party to the action, his interests were in no wise affected by the evidence of the wife. It was insisted that the evidence of the wife tended to criminate her husband and show him guilty of bigamy, but Lord Ellenborough in disposing of this point, while admitting that it is a good objection to the testimony of either husband and wife, that it may produce some latent possible effect, which in its results may occasion inconvenience to the other, yet held that in collateral proceedings, or actions between third persons, the wife might be admitted to testify to matters even, that tended directly to criminate the husband, if such matters did not grow out of or involve marital confidence.

The rule now seems to be well established, that even when the husband and wife are implicated but not charged with the crime, that either may tes-

testimony. Subsequently the plaintiff's counsel offered to waive the objection; but the judge, notwithstanding, refused to receive the evidence. A verdict having been

tify either for the State or one who is indicted for the offense. Thus in *Regina v. Holliday*, 8 Cox's Cr. C. 298, the husband was admitted as a witness against the respondent who was charged with forgery, false pretenses and conspiracy under the following circumstances. The respondent forged the witness' name on an order for £60 on the savings bank and procured the witness' wife to present it and get the money, and then eloped with her. They were afterward arrested, and the respondent was indicted, but the wife was not. Pollock, C. B., admitted the evidence, and the respondent was convicted.

So it seems to be now generally conceded that in all cases where the husband or wife are jointly indicted with another, but separate trials are had, that the wife of one who is not on trial may be admitted as a witness either for or against the other respondents, except in cases where the offense is in its nature joint, as for a conspiracy, but that she cannot be compelled to testify; she may testify or not, as she pleases. *Wixon v. People*, 5 Parker's Cr. Rep. (N. Y.) 119; *Com. v. Reid*, 8 Phila. (Penn.) 354; *State v. Anthony*, 1 McCord (S. C.), 285; *State v. Worthington*, 31 Me. 62; *State v. Bradley*, 9 Rich. (S. C.) 168; *King v. Bothwick*, 2 B. & Ad. 639; *Thompson v. Com.*, 1 Metc. (Ky.) 13.

Neither is the rule confined to cases in which the one or the other is a party, but is extended to cases in which, where, although not parties of record, they have an interest in the issue. *Bird v. Hueston*, 10 Ohio (N. S.), 418; *State v. Worthington*, 31 Me. 62.

As a general rule the wife can be a witness in all actions to which she is made a party either plaintiff or defendant. The rule is, that, when the wife has an interest in the event of the suit, which would survive to her in case of her husband's decease, she is competent to testify in all cases where her husband could testify. But if she is not a necessary party, the fact that she is properly joined as a plaintiff in the action does not render her evidence competent or admissible *as of course*. Thus in *Smith v. Boston, etc., R. R. Co.*, 44 N. H. 334, it was held that, although the wife was properly joined with the husband in an action for personal injuries received by her before her marriage, yet she was not a competent witness in the action.

But where an action is brought for personal injuries sustained by her *after* marriage, and she is made a party plaintiff, and her husband dies during the pendency of the action, it was held, by the same court, that she was a competent witness. *Winship v. Enfield*, 42 N. H. 197. Thus in *Hallowell v. Simonson*, 21 Ind. 398, where the husband and wife were both parties, but the subject-matter was wholly claimed by and belonged to the wife, and the husband was not a necessary party to the action, it was held that the husband was not a competent witness.

The rule of the common law is broad and sweeping, and provides that they

found for the plaintiff, a rule was granted to set it aside on the grounds, first, that the statute had rendered the wife a competent witness; and, secondly, that, if not,

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cannot be witnesses for or against each other, where either party is interested in the issue. *McDuffie v. Greenway*, 24 Tex. 625.

But there are cases where the husband or wife may testify against each other, as in cases of personal injury to either, committed by the one upon the other: in a prosecution therefor, against either, the other may, if willing to do so, give evidence for the prosecution, but they are not compellable to do so. So, also, they may testify as to facts which are in their nature secret, and affecting the person. *Commonwealth v. Reid*, 1 Penn. Leg. Gaz. Rep. 182. So, too, the wife may testify against the husband in a prosecution against him, either jointly with another or alone, for using an instrument upon her with intent to commit abortion. *State v. Dyer*, 59 Me. 303; *State v. Briggs*, 9 R. I. 361.

So, too, her dying declarations may be used against the husband upon a trial for her murder. *Woodcock's Case*, 2 Leach's Cr. Cas. 563; *John's Case*, 1 East's P. C. 357; *Pennsylvania v. Stoops*, Addis. (Penn.) 381; 1 Phillips on Evidence, 80. So in a prosecution for an assault upon her by him with a deadly weapon, although no violence was in fact committed; *Whitehouse's Case*, 2 Russ. 606; for assault and battery, or breach of the peace by threats of violence, when the threats are of such a character as show a purpose to execute them, or reasonably to put her in fear; Buller's Nisi Prius, 286, 287; so for a forcible marriage; *Respublica v. Hevice*, 2 Yeates (Penn.), 114; and that even though she afterward voluntarily cohabited with him; *Wakefield's Case*, 2 Russ. 606; *Swinden's Case*, 4 Howell's St. Tr. 575; so for a rape committed by him upon her person; Buller's Nisi Prius, 287; so for bigamy, the second wife may testify; *Mary Grigg's Case*, T. Ray. 1; Buller's Nisi Prius, 287; and when he is charged with treason; McNally's Ev.; and even for or against him, although the first wife cannot be a witness. *Rex v. Sergeant*, 1 Ryan & Moody, 354, and it may be stated as a general proposition that the wife may be admitted to testify against her husband in all prosecutions against him for offenses against her liberty or person where actual violence is committed or threatened. 1 Phillips on Ev. 78, 79.

So a husband or wife in an action to which neither is a party, and in which neither has any interest, may be called upon to testify to matters that will tend to disgrace or discredit the testimony of the other, when the matter inquired of is not an indictable offense. *Ware v. State*, 35 N. J. 553. Following the doctrine of *King v. Bothwick*, 2 B. & Ad. 639, which may be regarded as the rule in all cases where either is called to testify in collateral proceedings or in actions between third persons where neither is interested in the issue. So it has been held that where the husband is jointly indicted with another, and has forfeited his recognizance, his wife may be called as a witness by his

her testimony ought to have been received when the objection was waived. This rule having been argued, and several of the preceding cases with some others

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co-respondent. *State v. Worthington*, 31 Me. 62. So to prove desertion and marriage in collateral proceedings. *Nathan's Case*, 2 Brewst. (Penn.) 149.

So upon grounds of necessity to prove secret facts, as, upon an order of affiliation, to prove connection with the defendant, although the husband is interested. *Com. v. Shepherd*, 6 Binn. (Penn.) 283. But in a prosecution for adultery, the husband is not a competent witness. *Com. v. Sparks*, 7 Allen (Mass.), 584; *Com. v. Gordon*, 2 Brewst. (Penn.) 569. So where property claimed by the wife is attached as the property of the husband, he is not a competent witness for the garnishee on the trial of the attachment. *Gross v. Reddig*, 45 Penn. St. 406. So where the husband and wife derive title to an estate through either, neither is a competent witness to discredit the title. *Moody v. Fulmer*, 3 Grant (Penn.), 17.

In an action for *crim. con.* the wife is not a competent witness, but her letters or admissions are competent proof if brought to the knowledge of the defendant. *Tilton v. Beecher*, Brooklyn (N. Y.), Sup. Ct., 1875, before Neilson, J.; Buller's Nisi Prius, 28. So the defendant may introduce letters from her, received by him prior to the intercourse, which tend to show that she solicited the defendant to have intercourse with her, in mitigation of damages, but not letters received subsequently, nor can he introduce evidence of her subsequent misconduct. *Elsam v. Faruett*, 1 Esp. 562. But this does not extend beyond those cases where the indictment alleges personal violence, or an intent to commit it, upon the wife. Thus in *Com. v. McEwen*, 1 Penn. L. J. 140, it was held that the wife was not a competent witness against the husband upon an indictment for a conspiracy to obtain a divorce from her, the indictment not alleging actual personal violence upon her, or an attempt to commit it. So in *People v. Carpenter*, 9 Barb. (N. Y.) 580, in an indictment against the husband for using criminal means (subornation of perjury) to wrong her in a judicial proceeding, it was held that the wife was not a competent witness for the people, because, although the crime affected her, yet, it was not a crime in which personal violence was committed upon or threatened against her.

So there are exceptions to this rule, that grow out of a pressing necessity, and are dictated by sound public policy.

Thus, in an action to recover the value of a lost trunk belonging to the husband or wife, the wife may, in an action brought by the husband, testify as to the contents of the trunk as well as the value thereof. *Illinois Central R. R. Co. v. Taylor*, 24 Ill. 323; *Same v. Copeland*, id. 232; *McGill v. Rowand*, 3 Barr. (Penn.) 451.

So where a transaction has been had with her as the agent of the husband, she may testify as to what occurred in reference to such transaction. *Magness v. Walker*, 26 Ark. 47. As where she makes the entries in her husband's books of account by his direction, she may testify to the making of the entries by her;

cited, the court discharged it; holding unanimously, that the statute had not rendered the wife competent; and, even supposing the objection could be waived by

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*Littlefield v. Rice*, 10 Metc. (Mass.) 287; or where she buys or sells goods for or in the husband's shop; *Anderson v. Sanderson*, 2 Starkie, 204; or where any transaction is had with her in reference to the husband's business; *Emerson v. Blonden*, 1 Esp. 141; but the transaction must have been with her as agent for her husband, and her agency must be established by proof of express authority; or the transaction must have been of such a character that the law will imply agency, and, where the husband permits his wife to act for him in any department or business, or in any transaction, or where he ratifies any act done by her for him in his business, her admissions or acknowledgments in reference to such matters are admissible in evidence against him. Thus, in *Emerson v. Blonden*, 1 Esp. 142, the defendant and his wife hired rooms of the plaintiff and occupied them together. The wife hired the rooms at a certain rent, and agreed to give three months' notice of quitting. They quit the rooms without notice, and action was brought for three months' rent. The wife acknowledged the contract and promised to pay the sum claimed. It was held that this was competent evidence to charge the defendant. Lord Kenyon, observing "Where a wife acts for her husband in any business by his authority, and with his assent, he thereby adopts her acts, and must be bound by any admission or acknowledgment made by her *respecting that business*." So in *Anderson v. Sanderson*, 2 Starkie, 204, it was held that, where a husband leaves his wife in charge of his store, and permits her to buy goods to be sold therein, she is to be deemed his agent for that purpose, and that her admissions are binding upon him respecting purchases so made by her, even to the extent of taking the case out of the statute of limitations.

A wife is not a competent witness for the husband in an action for *crim. con.* *Hicks v. Bradner*, 2 Abb. (N. Y.) App. 362. Neither after she has been divorced can she be a witness against her husband, when her testimony involves the revelation of confidential communications received from her husband during the marital relations, but otherwise as to communications *not* confidential, but which it is evident it must have been intended by the husband that she should reveal to the public. Thus, in an action of replevin by a former husband to recover goods sold by the wife, it was held that she was a competent witness to prove that he authorized her to sell the goods; *Crook v. Henry*, 25 Wis. 569; so it has been held that a divorced wife is not a competent witness in favor of her former husband against one who had seduced her; *Rhea v. Tucker*, 51 Ill. 110; but the rule does not extend to one living with a man as his mistress: *Dennis v. Crittenden*, 42 N. Y. 542; nor to one who is a wife only by the presumption arising from long cohabitation, particularly in a criminal prosecution; *Hill v. State*, 41 Ga. 484; nor to suits between husband and wife respecting lands or other property. *Darrier v. Darrier*, 53 Mo. 222.

consent, the allowing it to be waived was discretionary with the judge. But the members of the court were not agreed as to whether the objection could be waived. Parke and Martin, BB., said that, if it were necessary to decide that question, they would like further time for consideration. Platt, B., said he was of the same opinion as Parke, B., and for the same reasons. Pollock, C. B., however, delivered his judgment more at length, as follows: "In my opinion, a judge is bound to administer the whole law of evidence; and although a practice has crept in of admitting inadmissible \*evidence by consent, still that is a matter [ \* 129 ] for the discretion of the judge. The cases which have been adverted to with reference to waiving the objection to an interested witness scarcely apply; for, strictly speaking, all objections to the competency of a witness, on the score of interest, ought to be taken on the *voir dire*, before the witness is sworn. Therefore, in those cases where persons have been examined by consent, although they had an avowed interest, it was only going back to the old law; and, after the witness was sworn, there was, in truth, no objection to waive. I think that it is in the discretion of the judge whether he will admit the evidence objected to; otherwise, if the parties agreed that a witness should give his evidence unsworn, or if a person openly declared himself an atheist, I do not see why those persons might not be examined. The consent of the parties will not entitle them to use an affidavit which is inadmissible. Some additional light may be thrown on the subject by this circumstance,—that when parties are to be examined in a court of law, under an order of a court of equity, the order is positive that the witnesses shall be examined, which would be



useless unless the court had power to reject them notwithstanding the consent of the parties. I think that the judge, in his discretion, has a right to insist on the law of England being administered; and, when any departure from it is proposed, to say to the parties, 'You shall not make a law for yourselves.' " In a subsequent case, however, of *Hodges v. Lawrence*,<sup>1</sup> where an application by a defendant to remove a cause from a county court was resisted, on the ground that the plaintiff's principal witness was his wife, and consequently he would be deprived of her testimony if the cause were brought into a superior court, the Court of Exchequer granted the application on the defendant's \*consenting that the wife should be examined as a witness. [ \* 130 ]

*Two other remarkable features of the English system — Checks on witnesses — Vivâ voce examination — Publicity of judicial proceedings.*

§ 100. We now come to consider the two other remarkable features of the English system of judicial evidence, which were mentioned early in this Part,<sup>2</sup> namely, the vivâ voce examination of witnesses, and the publicity of judicial proceedings. Our law of evidence bears a general resemblance to other systems in its safeguards or securities for the truth of testimony — like them it has its political sanction of truth, an oath or affirmation, its legal forms of pre-appointed evidence, its incompetency of witnesses, and in a few cases its rules requiring a plurality. But of all checks on the mendacity and misrepresentations of witnesses, the most effective is the requiring their evidence to be given *vivâ voce*, in presence of the party against whom they are produced,

<sup>1</sup> 17 Jur. 421.

<sup>2</sup> *Suprà*, § 80.

who is allowed to "cross-examine" them, *i. e.*, ask of them such questions as he thinks may serve his cause. The great tests of the truth of any narrative are the consistency of its several parts, and the possibility and probability of the matters narrated.<sup>1</sup> (Stories false in toto are comparatively rare<sup>2</sup> — it is by misrepresentation, suppression of some matters, and addition of others, that a false coloring is given to things, and it is only by a searching inquiry into the surrounding circumstances that the whole truth can be brought to light. Now, although much valuable evidence is often elicited by questions put from the tribunal, and although the story told by a witness frequently discloses of itself some inconsistency or improbability fatal to the whole, it is chiefly from the party against whom false testimony is directed, that we can expect to obtain the most efficient materials for its detection. He, above all others, is interested in exposing it, and is the person best

[ \* 131 ] \*acquainted, often the only person acquainted, with the facts as they really have occurred. Besides, as the answer to one question frequently suggests another, it is extremely difficult for a mendacious witness to come prepared with his story ready fitted to meet any question which may be thus put to him on a sudden.<sup>3</sup> The other great check is the *publicity* of our judicial proceedings — our courts of justice being open to all persons; and in criminal cases, the by-standers are even invited by proclamation to come forward with any

<sup>1</sup> Introd. § 24.

<sup>2</sup> Id. § 26.

<sup>3</sup> The advantages of the common-law mode of interrogating witnesses, as compared with that made use of in the civil and canon laws, and formerly in our ecclesiastical and equity courts, &c., are ably shown by Bentham in the 3rd Book of his *Judicial Evidence*.

evidence they may possess affecting the accused. The advantages of this are immense. "In many cases," observes an author who is amply quoted in the present work,<sup>1</sup> "say rather in most (in all except those in which a witness, bent upon mendacity, can make sure of being apprised with perfect certainty, of every person to whom it can by any possibility have happened to be able to give contradiction to any of his proposed statements), the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. \* \* \* Environed, as he sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from a thousand tongues; many a known face, and every unknown one, presents to him a possible source of detection, from whence the truth he is struggling to suppress may, through some unsuspected channel, burst forth to his confusion."

The practice of the civil<sup>2</sup> and canon laws, as is \*well known, differs wholly from ours in these respects. Witnesses are examined in private [ \* 132 ] by a judge or officer of the court, and their depositions, reduced into form, transmitted to the tribunal by which the cause is to be tried. And absurd as this may seem it is not without its defenders, who condemn our common-law system altogether, and contend that secrecy and written deposition constitute the very essence of justice. All their arguments, however, when examined, come to this,

<sup>1</sup> 1 Benth. Jud. Ev. 552. See that work, bk. 2, ch. 10, sect. 2, where the advantages of the publicity of judicial proceedings are very clearly pointed out.

<sup>2</sup> By the civil law we mean that form of Roman law which, during so many centuries, prevailed on the Continent of Europe. The practice of the ancient Romans in a great degree resembled our own. See Acts, xxv. 16; Dig. lib. 22, tit. 5, l. 3, §§ 3 & 4; Quintilian, Inst. Orat. lib. 5, c. 7, and Devotus, Inst. Canon. vol. 2, lib. 3, tit. ix. §§ 17 & 18, 5th Ed.

that it is wise to sacrifice certain and constant good in order to avoid occasional and exceptional evil. Where, say they, witnesses are called on to explain their answers, and one question is followed up by another, a false witness *may* adapt his answers to circumstances; *therefore*, let every witness who happens to be misunderstood — all men are not masters of language, and in the hands of the ablest of us it often fails to communicate our thoughts — be deprived of opportunity of setting himself right with his interrogator and the tribunal. Again, an honest, but timid or weak-minded witness, *may* be so affected by the novelty of his situation, or so brow-beaten by his cross-examiner, as to be unable to give evidence, or perhaps even made to contradict himself; *therefore*, say the partisans of the civil and canon law practice, let the feeling of shame that so often deters men from stating in public falsehoods which they would unblushingly state in private, be erased from the minds of all witnesses who present themselves in courts of justice; and let us shut out the incalculable light thrown on every sort of verbal testimony by the demeanor of the person who gives it. The most limited experience will testify, that *what* a man says is of very small account indeed compared with his *manner* of saying it. Besides, when justice is defeated by cross-

[ \* 133 ] \*examination pushed to excess, the chief fault rests with the judge, whose duty it is to reassure and encourage the witness. And after all, brow-beating and annoying a witness are very different from discrediting him; we should remember that the cross-examination takes place in presence of a judge and jury, who are on the watch to discover whether the confusion or vacillation of the witness is attributable to false shame,

mistake or mendacity. Most of the advantages of secret examination, without its dangers, are attainable by examining the witnesses out of the hearing of each other—a practice constantly adopted in courts of common law, when combination among them is suspected, or the testimony of one is likely to exercise a dangerous influence over others.

*Exceptions to the rule requiring the personal attendance of witnesses at trials.*

§ 101. But however valuable the principle which requires the presence of witnesses at a trial, the strict enforcement of the rule under all circumstances would be an impediment to justice. Either from the evils of an unbending adherence to it being less felt in early times, or from the comparatively slender attention paid to evidence in general by our ancient lawyers, certain it is that the common law made little or no provision on this subject; but large improvements have been effected by modern legislation. After the union with Scotland and the complete establishment of our Indian empire, the mischiefs arising out of the imperfections of the ancient system became too great to be overlooked; and the 13 Geo. 3, c. 63, contains several provisions directed to this object. In the first place it enacts,<sup>1</sup> that “in all cases of indictments or informations, laid or exhibited in the Court of King’s Bench, for misdemeanors or offenses committed in India, it shall be lawful for his Majesty’s said Court, upon motion to be \*made on behalf of the prosecutor, or of the defendant or defendants, to award a writ of [\* 134.] mandamus, requiring the chief justice and judges of the

<sup>1</sup> Sect. 40.

supreme court of judicature for the time being, or the judges of the Mayor's Court at Madras, Bombay or Bencoolen, as the case may require, who are hereby respectively authorized and required accordingly, to hold a court with all convenient speed, for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments or informations respectively; and, in the meantime, to cause such public notice to be given of the holding the said court, and to issue such summons or other process, as may be requisite for the attendance of witnesses, and of the agents or counsel, of all or any of the parties respectively, and to adjourn, from time to time, as occasion may require: and such examination as aforesaid shall be then and there openly and publicly taken *vivâ voce* in the said court, upon the respective oaths of witnesses, and the oaths of skillful interpreters, administered according to the forms of their several religions; and shall, by some sworn officer of such court, be reduced into one or more writing or writings on parchment, &c., and shall be sent to his Majesty, in his Court of King's Bench, closed up, and under the seals of two or more of the judges of the said court, and one or more of the said judges shall deliver the same to the agent or agents of the party or parties requiring the same; which said agent or agents (or, in case of his or their death, the person into whose hands the same shall come) shall deliver the same to one of the clerks in court of his Majesty's Court of King's Bench, in the public office, and make oath that he received the same from the hands of one or more of the judges of such court in India, &c.; and such depositions, being duly taken and returned, according to the true intent and meaning of this act, shall be allowed and read, and shall be deemed as good and

\*competent evidence as if such witness had been present, and sworn and examined *vivâ voce* at [\* 135] any trial for such crimes or misdemeanors, as aforesaid, in his Majesty's said Court of King's Bench, any law or usage to the contrary notwithstanding; and all parties concerned shall be entitled to take copies of such depositions at their own costs and charges." And by a subsequent section,<sup>1</sup> "when any person whatsoever shall commence and prosecute any action or suit, in law or equity, for which cause hath arisen, or shall hereafter arise in India, against any other person whatever, in any of his Majesty's courts at Westminster, it shall and may be lawful for such court respectively, upon motion there to be made, to provide and award such writ or writs in the nature of a mandamus or commission, as aforesaid, to the chief justice and judges of the said supreme court of judicature for the time being, or the judges of the Mayor's Court at Madras, Bombay or Bencoolen, as the case may require, for the examination of witnesses, as aforesaid; and such examination, being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action, in the same manner, in all respects, as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated." Another section<sup>2</sup> contains a proviso, that "no such depositions, taken and returned as aforesaid by virtue of this act, shall be allowed or permitted to be given in evidence in any capital cases, other than such as shall be proceeded against in Parliament."

§.102. This statute, it is obvious, went but a short way toward remedying the evil: and several others

<sup>1</sup> Sect. 44.

<sup>2</sup> Sect. 45.

with similar provisions; as, for instance, the 42 Geo. 3, [\* 136] \*c. 85, and 1 Geo. 4, c. 101, were passed from time to time to meet the exigencies of certain classes of cases. Nothing effectual was done, however, until the 1 Will. 4, c. 22, entitled "An Act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories and otherwise." The first section enacts, that all and every the powers, authorities, provisions and matters contained in the 13 Geo. 3, c. 63, relating to the examination of witnesses in India, shall be extended to all colonies, islands, plantations and places under the dominion of his Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his Majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority thereby given, will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for.

§ 103. The 1 Will. 4, c. 22, contains, however, other provisions more important and extensive than this. It empowers<sup>1</sup> each of the courts at Westminster, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the

<sup>1</sup> Sect 4.



examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of \*any witnesses within the jurisdiction of the court where the action shall be depending, or [ \* 137 ] to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just. Also,<sup>1</sup> that “when any rule or order shall be made for the examination of witnesses within the jurisdiction of the court wherein the action shall be depending, by authority of this act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the willful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment, &c.: provided that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the

<sup>1</sup> Sect. 5.

cause.” The examination is directed to be on oath, or affirmation in cases where the law allows an affirmation: and persons giving false evidence are to be deemed guilty of perjury.<sup>1</sup> But lest the power of examining witnesses [ \* 138 ] in this way should be perverted to \*superseding the salutary practice of the common law, it is enacted,<sup>2</sup> that “no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial.”

§ 104. Still further improvements in this respect have been effected by the 6 & 7 Vict. c. 82, which provides means for compelling the attendance of persons to be examined under commissions for the examination of witnesses, &c., to be executed in parts of the realm subject to different laws from those in which the commissions are issued; and the 22 Vict. c. 20, which provides for taking evidence in suits and proceedings before tribunals in the Queen’s dominions in places out of the jurisdiction of those tribunals. And by the 22 & 23 Vict. c. 21, s. 16, the above provisions of the 13 Geo. 3, c. 63, and the 1 Will. 4, c. 22, are extended to all suits and proceedings on the Revenue side of the Court of Exchequer.

§ 105. The old statutes 1 & 2 P. & M. c. 13, s. 4, and 2 & 3 P. & M. c. 10, s. 2, enacted, that justices of the peace before whom persons were brought, charged with

<sup>1</sup> Sect. 7.

<sup>2</sup> Sect. 10.

felony, should, before committing to prison or admitting to bail, take the examination of the prisoner, and information of those that brought him, of the fact and circumstances thereof; and the same, or so much thereof as should be material to prove the felony, should put in writing, &c.; which statutes were repealed, re-enacted, \*and their provisions extended to cases of [ \* 139 ] misdemeanor, by 7 Geo. 4, c. 64, ss. 2, 3. This latter enactment has in its turn been repealed and amended by 11 & 12 Vict. c. 42, which enacts 'that where witnesses are examined on oath or affirmation against a person charged before a justice of the peace with any indictable offense, and their evidence has been put into writing, and their depositions read over to and signed respectively by them and the justice taking the same, "If upon the trial of the person so accused it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been so taken as aforesaid is dead, or so ill as not to be able to travel, and if, also, it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." The 1 & 2 P. & M. c. 13, s. 5, and 7 Geo. 4, c. 64, s. 4, give somewhat similar directions to coroners holding inquisitions of murder or manslaughter; and the Merchant Shipping Act, 17 & 18 Vict.

<sup>1</sup> Sect. 17.

c. 104, s. 270, has some provisions of a like nature for offenses under that act.

*Salutary effect of the publicity of judicial proceedings on the tribunal and spectators.*

§ 106. Nor is it exclusively on witnesses that this institution of publicity exercises a salutary control. Its effect on the judge is no less conspicuous. "Upon his moral faculties," observes Bentham,<sup>1</sup> "it acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual faculties [ \* 140 ] \*it acts as a spur, urging him to that habit of unremitting exertion, without which his attention can never be kept up to the pitch of his duty. Without any addition to the mass of delay, vexation, and expense, it keeps the judge himself, while trying, under trial. Under the auspices of publicity, the original cause in the court of law, and the appeal to the court of public opinion, are going on at the same time. So many bystanders as an unrighteous judge (or rather a judge who would otherwise have been unrighteous) beholds attending in his court, so many witnesses he sees of his unrighteousness; so many ready executioners, so many industrious proclaimers, of his sentence. On the other hand, suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. \* \* \* Publicity is farther useful, as a security for the reputation of the judge (if blameless) against the imputation of having misconceived, or, as if

<sup>1</sup> 1 Jud. Ev. 533-5.

on pretense of misconception, falsified, the evidence. Withhold this safeguard, the reputation of the judge remains a perpetual prey to calumny, without the possibility of defense. \* \* \* Another advantage (collateral indeed to the present object, yet too extensively important to be passed over without notice) is, that, by publicity, the temple of justice adds to its other functions that of a school: a school of the highest order, where the most important branches of morality are enforced by the most impressive means; a theater, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice."

\*§ 107. There are few things, however excellent in themselves, the value of which may not [ \* 141 ] be overrated; and certainly the publicity of legal proceedings is not one of them. Not only are there certain cases for which privacy either total or partial is advisable, but Bentham overrates the principle of publicity when he proposes to intrust the decision of all questions, both of law and fact, to a judge; relying on the publicity of the proceedings, accompanied by ample recordation or notation of the evidence, and appeal to a superior tribunal, as sufficient checks upon his conduct. Following up this view he condemns juries in his *Treatise on Judicial Evidence*;¹ though in other parts of the same work he bears unconscious testimony to their value;² and in his *Principles of Judicial Procedure*³ he admits that they

✓ ¹ 2 *Jud. Ev.* 285, 286; 4 *Id.* 11, 333, ✓ ² See 1 *Id.* 351; 4 *Id.* 585. ✓  
334; 5 *Id.* 531. ✓ ³ Chap. 23, § 1. ✓ ✓ ✓ ✓

ought not to be abolished in cases where the liberty of the subject is involved. There is not the slightest pretense for saying that any *one* of these three checks would, *standing by itself*, attain the desired object. First, with respect to recordation or notation of the evidence, in other words, the security afforded by *writing*. If the evidence is to be taken down verbatim it would add enormously to the expense of trials; if only minutes of it are to be made, the whole case does not come before the appellate tribunal; and in either case the sources of mischief which are to be found in the ignorance, the laziness, the complaisance, and even the corruption of the notary, scribe, greffier, or whatever else he may be called, are not to be overlooked. Secondly, as to *appeal*,—appeal to a superior tribunal on mere facts, or combinations of law and fact, is, when considered in se, of all checks on misdecision the most illusory, and of all encouragements to vexatious litigation the greatest. Through the mass of allegation, argument and evidence, it is sometimes almost impossible \*to ascertain on what ground [ \* 142 ] the decision of the court below proceeded—a disbelief of the witnesses, a misunderstanding of their testimony, or an erroneous view of the law;—and the judge whose decision is appealed from may fairly ask that the superior tribunal shall have before it *all* the materials on which his decision was founded. But this is from the nature of things impossible: who is to report the *demeanor* of the witnesses when giving their testimony? and the evidence itself may be so voluminous as in the case of a poor litigant to amount to a prohibition of appeal.<sup>1</sup>

<sup>1</sup> We find the following stated as the practice of our own ecclesiastical courts, at least as they existed until recently, in which, by the way, all Bentham's three checks were united. "The party appealing is called upon to *print* the allega-

Moreover, when the decision of the superior tribunal reversing that of the inferior is obtained, it carries little or no moral weight with it; for it is only the opinion of judge A. against that of judge B., on some question of law, or the credit due to witnesses, or the inferences to be drawn from certain facts; in which, after all, judge B., whose decision is reversed, may be right. Of this even Bentham himself was so conscious, that he admits that, without *publicity*, recordation, appeal, and all other institutions in the character of checks, would be found rather to operate as cloaks.<sup>1</sup> But publicity, standing by itself, would be equally inefficient. The trials of Naboth, Socrates, Milo, Throckmorton, Sydney, Baxter, &c., were as *public* as could be; *i. e.*, so far as publicity consists in the doors of the court being open \*to all persons who please to go into them; and as the number of persons that do this must [ \* 143 ] necessarily be very limited, the publicity here spoken of by Bentham probably means publicity through the agency of the press. The liberty of the press would not, however, last long if the power of determining both the law and the facts in all causes, both civil and criminal — of passing sentence in case of conviction in the former, and assessing the damages for the successful plaintiff in the latter — were vested in judges who are the nominees of the executive, and liable as men to prejudices of class and station, political and personal. Let it also be re-

tions and answers on both sides, the expense of which, including the evidence and exhibits, he must sustain in the first instance. And the opponent proctor has the right to call on the appellant to print the whole, or so much or such parts of the evidence and exhibits in the case as he thinks fit. This may, in many instances, amount to a denial of appeal. In one particular case the party did intend to appeal, but, finding that the printing alone would cost very nearly 1,000*l.*, he abandoned the idea of appealing." 3 Jur. 140.

<sup>1</sup> 1 Jud. Ev. 524

membered that the liberty of the press in this country dates only from the latter end of the seventeenth century; that trial by judge and jury protected the other liberties of the country, long before liberty of the press had any existence, and since that period has protected both it and them; and that we find Bentham's three checks combined in the practice of the civil tribunals of modern France, the superiority of which over all others has not, at least as yet, been demonstrated.

We trust we have shown that without the assistance of a casual tribunal, through which alone the cleansing tide of fresh thought is poured into judicial proceedings, they never could be kept pure and healthy; and that no effectual checks ever have been, or ever can be, devised against the obvious and great dangers of intrusting the decision of facts to a fixed one, however elaborately constituted. Among many other testimonies to the wisdom of our ancestors in the constitution of their ordinary judicial tribunal, are to be found the recent introduction of the mode of taking evidence *vivâ voce* into the Court of Chancery,<sup>1</sup> the Court of Admiralty,<sup>2</sup> and the ecclesiastical courts,<sup>3</sup> and on the hearing of motions \*and  
[ \* 144 ] summonses in the courts of common law;<sup>4</sup> the establishment of the jury in the two first,<sup>5</sup> and in the new court to which the principal part of the business of the ecclesiastical court has latterly been transferred;<sup>6</sup> and that on the continent of Europe, where the practice of the civil and canon laws has prevailed for centuries,

<sup>1</sup> 15 & 16 Vict. c. 86, ss. 28 *et seq.*

<sup>2</sup> 3 & 4 Vict. c. 65, ss. 7 *et seq.*

<sup>3</sup> 17 & 18 Vict. c. 47; 20 & 21 Vict. cc. 77 and 85.

<sup>4</sup> 17 & 18 Vict. c. 125, ss. 46 *et seq.*

<sup>5</sup> 21 & 22 Vict. c. 27, s. 3; 3 & 4 Vict. c. 65, s. 11.

<sup>6</sup> 20 & 21 Vict. cc. 77 and 85.



we everywhere find the inhabitants loudly demanding, as reforms essential to a sound administration of justice, "The trial by jury," and "Publicity of judicial proceedings."

x

[\* 145]

## \*PART II.

HISTORY OF THE RISE AND PROGRESS OF THE ENGLISH  
LAW OF EVIDENCE: WITH ITS ACTUAL STATE AND PROS-  
PECTS.

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*Object of this Part.*

§ 108. It is proposed in the present Part to trace the rise and progress of the law of evidence in this country ;

\*concluding with some observations on its actual state and prospects. [ \* 146 ]

*Inconsistent dicta as to the antiquity of the judicial evidence of this country.*

§ 109. On the first of these subjects little is to be found in our modern works, beyond a few dicta, not very consistent with each other. In the case of *R. v. The Inhabitants of Eriswell*,<sup>1</sup> decided in Trinity Term, 1790, Lord Kenyon, C. J., is reported to have said, "the rules of evidence have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded;" and in *Bauerman v. Radenius*,<sup>2</sup> about eight years later, he informs us that at the beginning of the eighteenth century, Lord Macclesfield said that the most effectual way of removing landmarks would be by innovating on the rules of evidence; and so he said himself. This, however, is not the general opinion of the present day, in which our system of judicial evidence is commonly spoken of as something altogether modern: and in the case of *Lowe v. Jolliffe*,<sup>3</sup> decided not quite thirty years previous to that first quoted, Lord Mansfield, C. J., is reported to have declared on a trial at bar, that the court "did not then sit there to take its rules of evidence from Siderfin and Keble;" whose reports begin about a century before the time when he was speaking. In the proceedings against Queen Caroline, in the year 1820,<sup>4</sup> Abbott, C. J., in delivering the answer of the judges to a question put by the

<sup>1</sup> 3 T. R. 707, 721.

<sup>2</sup> 7 T. R. 663, 667.

<sup>3</sup> 1 W. Blackst. 366.

<sup>4</sup> 2 B. & B. 289; see *infra*, bk. 3, pt. 2, ch. 3.

House of Lords, said, "in their judgment it is a rule of evidence as old as any part of the common law of England, that the contents of a written instrument, if it be in existence, are to be proved by the instrument itself, and not by parol evidence." On the other hand, in the work on evidence by Messrs. Phillips and [ \* 147 ] \*Amos,<sup>1</sup> published in 1838, it is said that the law of evidence, according to which the determinations of the courts are at present governed, has been almost entirely created since the time of the reporters Lord Raymond, Salkeld and Strange; *i. e.*, since a period beginning shortly after the revolution of 1688, and ending at a tolerably advanced point in the reign of Geo. II. Also, in the 10th ed. of Phillips on Evidence, published in 1852,<sup>2</sup> it is stated that the important rule rejecting hearsay or second-hand evidence is not of great antiquity, and that one of the earliest cases in which it was acted upon is *Samson v. Yardly*, P. 19 Car. II., 2 Keb. 223.

*Difference between the ancient and modern systems.*

§ 110. The truth seems to be, that while "The Law of Evidence" is the creation of comparatively modern times, most of the leading principles on which it is founded have been known and admitted from the earliest; and in order to show the nature of the ancient, as well as the advantages of the modern system, it will be necessary to examine those principles.

<sup>1</sup> Page 335.

<sup>2</sup> Vol. 1, p. 165.

*Rules of evidence are either primary or secondary—Primary rules of evidence—Only three—Universal recognition of them—Secondary rules of evidence—Much more numerous—Some almost as universal as the primary.*

§ 111. All rules respecting judicial evidence may be divided into *primary* and *secondary*; the former relating to the *quid probandum*, or thing to be proved, the latter to the *modus probandi*, or mode of proving it. Of the former there are but three: 1st. That the evidence adduced must be directed solely to the matters in dispute; 2nd. That the burden of proof lies on the party who would be defeated supposing evidence were not given on either side; and 3rd. That it is sufficient for a party on whom the burden of proof lies to prove the substance of the issue raised. These rules are so obviously reasonable and necessary for the administration of justice, that it would be difficult to find a system in which they have not at least a theoretical existence, however their effect may occasionally have been extended or narrowed by \*artificial and technical reasoning; and accordingly they have always been recognized in our own.<sup>1</sup> The secondary rules are necessarily more numer-

<sup>1</sup> That the proof should be confined to the issues raised, and consequently that the admissibility of evidence depends on the state of the pleadings, see Finch, Comm. Laws, 61; the cases from the Year Books collected in 2 Rol. Abr. 676, 677, pl. 8, 10, 11, 13, 14, 24, 28, &c.; and those put by Bradshawe, A. G. arguendo, in *Reniger v. Fogassa*, Plowd. 7. Again, that the burden of proof lies in general on the party who asserts the affirmative, has been a recognized maxim of law from the earliest periods, see Bract. lib. 4, c. 7, fol. 301 B.; F. N. B. 106, H.; Co. Litt. 6 b; 2 Inst. 662; 4 Inst. 279; 3 Leon. 162, pl. 211; Gouldsb. 23, pl. 2; *Anon.*, Littl. R. 36; and the maxim "*actori incumbit onus probandi*," seems also to have been well known in former times; 4 Co. 71 b; Hob. 103. A case of the burden of proof-shifting is given by Glan-

ous, but there are some almost as obvious and universal as the primary. Probably no code of laws ever existed which was destitute of its estoppels, presumptions, and oaths or other sanctions of truth, or which neglected to establish the great principle, so essential to the peace of society, that matters and claims which have been once regularly and judicially decided, must be considered as settled and not again be brought into dispute. Of all these likewise we find ample mention in our early books;<sup>1</sup> [ \* 149 ] especially \*the first, the doctrine of which, as observed by a late able writer, was once tortured into a variety of absurd refinements.<sup>2</sup>

ville, lib. 10, c. 12. Also, that it is sufficient to prove the substance of the issue, see Litt. ss. 483, 484, 485; 6 Edw. III. 41 b, pl. 22; 8 Edw. III. 70 a, pl. 37; Hob. 73, 81; Tryals per Pais, 140, Ed. 1665; Co. Litt. 227 a; 281 b, 282 a, &c.

<sup>1</sup> See Glanv. lib. 12, c. 24, who wrote in the reign of Hen. II.; *Odo de Comp-ton's case*, Memor. in Scac. 29 Edw. I.; 6 Edw. III. 45 a, pl. 31; and the title "Estoppel" in the indexes to our old books, beginning with the Year Book of Edw. II. As instances of presumptions, or intendments, of law noticed by ancient authorities, see Fleta, lib. 6, c. 34, §§ 4 & 5; Bract. lib. 1, c. 9, § 4; Litt. ss. 99 & 103; Co. Litt. 42 a and b, 67 b, 78 b, 99 a, 232 b, 373 a and b; 5 Co. 98 b; 6 Co. 76 a; 10 Co. 56 a; 12 Co. 4 and 5; Cro. Eliz. 292, pl. 2; Cro. Jac. 252, pl. 6, and 451, pl. 29; Cro. Car. 317, pl. 14, and 550, pl. 2. It is well known that during the middle ages oaths were in constant use, or rather abuse, throughout Christendom; including this country, which always insisted on an oath as a test of truth, and had its judicial purgation under the name of wager of law. And with respect to the authority of *res judicata*: by the old statute, 4 Hen. 4, c. 23, it is ordained and established, that "after judgment given in the courts of our lord the king, the parties and their heirs shall be thereof in peace, until the judgment be annulled (anientiz) by attainr or by error, if there be error, as hath been used by the law in the times of the progenitors of our said lord the king." See, also, the stat. West. 2 (13 Edw. 1, stat. 1), c. 5, s. 2.

<sup>2</sup> 2 Smith's Lead. Cases, 607, 4th Ed.

*Others much less — Principles on which these are founded were well known to our ancestors.*

§ 112. Many of the other secondary rules of evidence are based on principles which, though quite as consonant to reason, and as much required for a perfect administration of justice, are not so obvious at first sight; and which, owing to the hardship of their enforcement in particular cases, and the great discretion required in their application, are sometimes apt to be disregarded. Among these may be reckoned the just principle, "*res inter alios acta alteri nocere non debet*," — that persons are not to be affected by the acts or words of others, to which they were neither party nor privy, and consequently had no power to prevent or control. We find this appealed to as a recognized maxim of law so early as the reign of Edward II.<sup>1</sup> Under this head comes

<sup>1</sup> M. 3 Edw. II. 53, tit. Entre; A writ of entry *ad terminum qui præterit* was brought, in which the demandant alleged that the tenant had right of entry only through A., his father, who leased to him the term, &c.; to which the tenant pleaded that the plaintiff was bastard, and could not claim as heir to A.; to which the demandant replied that he had formerly sued a writ against one C., who pleaded the bastardy of the demandant, who thereupon sued out a writ to the Bishop of L——, who certified to the court that he was mulier, &c. To this the tenant rejoined that he was no party to that proceeding, and *res inter alios acta aliis*, &c. To this it was answered that that maxim did not apply to such a case. The judges took time to consider until the next term, and then gave judgment, that as that court had been certified of the demandant's state of mulier by a certification, which was completed by a judgment given under that certification; and as he who is once mulier is mulier forever, no matter between whom it be, they gave judgment that he was entitled to seizin, &c. See on this subject, Co. Litt. 352 b; 2 Smith's Lead. Cas. 614, 4th Ed. The above case was decided exactly 350 years before the first case in *Siderfin*, while the reports of Keble begin a year later,— the two reporters whose authority on the subject of evidence Lord Mansfield, 1 W. Bl. 366, wished to consign to oblivion, on account of their *antiquity*. See also 2 Inst. 513. The rule "*res inter alios*, &c.," was well known at Rome. See Cod. lib. 7, tit. 60, ll. 1 and 2, in the latter of which it is spoken of as being "*notissimi juris*." *Infrà*, bk. 3, pt. 2, ch. 5.

[ \* 150 ] \*the great principle, the strict enforcement of which (as has been already stated<sup>1</sup>) forms a distinguishing feature of the English law of evidence; namely, the rejection of all transmitted or derivative evidence — of all proof offered second-hand, or *obstetricante manu*. We have seen the observations of Lord C. J. Abbott as to that branch of this rule which relates to written instruments;<sup>2</sup> and with respect to hearsay or second-hand evidence in general, our ancient lawyers seem to have had a thorough perception of its infirmity.<sup>3</sup> Thus,

<sup>1</sup> Introd. § 29, and *suprà*, pt. 1, § 89. See *infra*, bk. 3, pt. 2, ch. 3 and 4.

<sup>2</sup> *Suprà*, § 109. See Fleta, lib. 6, ch. 34, § 1, and 6 Mod. 248. This principle was also known to the Romans. Dig. lib. 22, tit. 4, l. 2; lib. 26, tit. 7, l. 57; Cod. lib. 4, tit. 21, ll. 5, 7, and 11; Domat, Lois Civiles, part. 1, Liv. 3, tit. 6, sect. 2, §§ x. and xi.

<sup>3</sup> It could hardly have been otherwise, as the infirmity of this kind of proof seems to have been observed in almost every age and country. According to the Athenian law hearsay evidence, or ἀκοήν μαρτυρεῖν, was allowed in cases where the supposed speaker was dead, and in some other instances; Law Mag. (N. S.) No. 1, p. 36. Hearsay appears to have been received in ancient Rome, Quint. lib. 5, cap. 7, at least as proof of old transactions, Dig. lib. 22, tit. 3, l. 28, and lib. 39, tit. 3, l. 2, § 8, although rumor and common report were estimated at their worth “Vanæ voces populi non sunt audiendæ: nec enim vocibus eorum credi oportet, quando aut noxium crimine absolvi, aut innocentem condemnari desiderat:” Cod. lib. 9, tit. 47, l. 12. And on the value of hearsay when admitted, Quintilian *in loc. cit.* says, “Gentium simul universarum elevata testimonia ab oratoribus scimus, et tota genera testimoniorum: ut *de auditionibus*; non enim ipsos esse testes, sed injuratorum afferre voces.” Instead of *injuratorum* some copies have *injuriatorum*, which wholly alters the sense of the passage, but the other reading is adopted by an immense majority of the commentators. The civilians and canonists admitted hearsay in proof of ancient rights and in some other cases, but in general looked on it with suspicion: Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 20; Mascardus de Prob. Concl. 151, 104; Struvius, Syntag. Jur. Civ. ed. Mülleri, Exerc. 28, tit. 45, note (η), ix. *et seq.* It is rejected in general by the Scotch law: Burnett’s Crim. Law Scotl. 600; 1 Dicks. Law Ev. in Scotl. 57 *et seq.*; and, it is said, also by the Mohammedan law, Macnagh. Mo. Law, 259. Under the old French law, Pothier expressly laid down, “Above all it is requisite that the witness who says he has a knowledge of any fact, should show how he has such knowledge. For instance, if I would prove that you had sold me such a thing, it would not be sufficient for the witness to say in vague terms, that he knew you



\*Sir Edward Coke, in the early part of the seventeenth century, lays down as a rule of law, [ \* 151 ]

had sold me that thing ; he should state how he had that knowledge ; for instance, that he was present at the agreement ; or that he had heard you say you had made such a sale ; if he said that he knew it from a third person, his deposition would not be any proof." 1 Ev. Poth. § 786. Loysel, a very ancient French authority, significantly observes, " Un seul œil a plus de crédit que deux oreilles n'ont *d'audire* ." and again, " Oûir dire va par ville, et en un muid de cuider n'y a point plein poing de savoir." In commenting on this, Bonnier, in his *Traité des Preuves*, § 205, observes, that a multitude of remarks of a similar nature have been made (by French lawyers, as it seems), but they are, after all, nothing more than cautions (*indications*), not positive precepts. And in another place he thus states the modern practice in France : " It is evident that proof weakens in proportion to its distance from its source. \* \* \* We therefore ought never to have recourse to proofs of the second degree when those of the first degree may be employed. \* \* \* It is only when the direct witnesses are dead, or incapable of deposing, that witnesses of the second degree are allowed to be called to reproduce the declaration of the first. Still, the very fact that it is no longer possible to hear the first should induce the judge to examine carefully if there be any symptoms of fraud ; for it is obvious that he who desires to injure without exposing himself to detection, will not fail to put a false statement in the mouth of some one from whom he cannot fear contradiction. A witness must be therefore doubly credible in order to have reliance placed on his deposition when it only amounts to a hearsay ; *à fortiori* proof is extremely weak when we are obliged to follow out a line (*parcourir une filière*) more or less complicated, before we can arrive at the direct testimony. And yet in the celebrated prosecution of the Calases, the strongest piece of circumstantial evidence came under the cognizance of the judge, only through the medium of four witnesses, who had, as it was said, successively transmitted it from one to the other ; and the first of those witnesses, the one who was supposed to have heard the threat uttered by the father to his son, was not even named, being an *unknown girl* whom it was impossible to find. While branding with just indignation proceedings where capital convictions were pronounced on such evidence, it must be acknowledged that public opinion alone can prevent a repetition of them. In this matter, as in every thing else which concerns the appreciation of testimony, it is impossible to lay down fixed rules beforehand ; for how can we determine *à priori* the precise point where truth begins and error ends ?" Id. §§ 728, 729. These observations, while they show the defects of the French judicial system, place in a strong light the excellence of our own. Such a case as that here referred to by Bonnier could hardly occur in England at the present day ; for our rules which regulate the admissibility of evidence being rules of *law*, no judge ought to receive such proof ; and were he to violate his duty, if not his oath, by so doing, still it would be for the jury, and not for him, to decide on its

[ \* 152 ] “Plus valet unus \*oculatus testis, quam auriti decem,” “Testis de visu præponderat aliis.”<sup>1</sup> So the judges having held, in the case of one William Thomas, that the statutes 1 Edw. 6, c. 12, s. 22, and 5 & 6 Edw. 6, c. 11, s. 12, which require that no person be proceeded against \*for treason except on the oath of two [ \* 153 ] lawful accusers, were satisfied by the evidence of one person who spoke of his own knowledge, and that of another who had the information from a third, and he from a fourth, to whom the first had related it.<sup>2</sup> The same authority pronounces it “a strange conceit that one may be an accuser by hearsay;” and says that the doctrine was utterly denied by the judges in Lord Lumley’s case,<sup>3</sup> H. 14 Eliz., a report of which he had seen in the handwriting of C. J. Dyer;<sup>4</sup> and Thomas’s case is

*value*, and pronounce the verdict of acquittal or condemnation. Nor did the principle in question escape the notice even of the rude legislators of the middle ages. Notwithstanding the widely-spread superstition which stamps with unquestionable veracity the statements of criminals at the place of execution, we find the following enactment in the Venedotian Code, or ancient code of North Wales, bk. 2, c. 4, § 11: “A thief at the gallows, respecting his fellow thieves: If he should assert that another person was an accessory with him in the robbery for which he is about to suffer; and he should persist in his assertion unto the state God went to and he is going to; his word is there decisive, and cannot be gainsaid: nevertheless his fellow-thief shall not be executed, but is a salable thief; for no person is to be executed on the word of another, if nothing be found on his person.” The Dimetian Code, or ancient code of West Wales, contains a similar provision: bk. 2, c. 5, § 9. See for these Codes the “Ancient Laws and Institutes of Wales, &c.,” printed under the direction of the Commissioners on the Public Records, 1841. It seems that the Hindu Code forms an exception; and that in that country the *secondary* witness, *i. e.*, the person who has been made acquainted with facts by hearsay, is as receivable as any other. Translation of Pootee, c. 3, s. 7, in Halhed’s Code of Gentoo Laws.

<sup>1</sup> 4 Inst. 279.

<sup>2</sup> *Thomas’s case*, Dyer, 99 b, pl. 68, P. 1. Mar.

<sup>3</sup> 3 Inst. 25.

<sup>4</sup> *Id.* 24.

also mentioned by Sir Matthew Hale as overruled.<sup>1</sup> As our legal history advances, the authorities become more distinct on this subject, and the inconclusiveness of hearsay or second-hand evidence seems to have been universally recognized during the latter half, at least, of the seventeenth century.<sup>2</sup> Instances are to be seen in the state prosecutions of that period;<sup>3</sup> and we sometimes find the objection taken even by persons not in the legal profession. Thus, Archbishop Laud, in his defense, observes of some evidence offered against him, that it is "hearsay;" and Lord William Russell, complaining on his trial that he thought he had very hard measure, that there was brought against him a great deal of evidence by hearsay,<sup>4</sup> the court at once admitted the objection, but evaded its force in a way that will be shown presently; and in Mich. T. 19 Jac. I., \*the principle that the opinions of witnesses are not a legitimate ground for legal [ \* 154 ] decision, was recognized in the Star Chamber.<sup>5</sup>

§ 113. Many other instances might be adduced to show the recognition, by our ancestors, of principles of evidence which we are in the habit of looking on as altogether modern. Even the rules of our forensic prac-

<sup>1</sup> 1 H. P. C. 306; 2 Id. 287. These authorities probably did not mean that the evidence of the second witness was to be rejected as coming second-hand; but that, being traceable up to the first witness, it was a mere repetition of his testimony, and consequently could not be considered as the evidence of a second *accuser* within the meaning of the statute. See Hale, *in loc. cit.*, and 2 Hawk. P. C. c. 25, s. 141.

<sup>2</sup> *Samson v. Yardly*, 2 Keb. 223, (5) P. 19 Car. II.; *Lutterell v. Reynell*, 1 Mod. 282, and the authorities in the next three notes.

<sup>3</sup> 9 Ho. St. Tr. 608, 848, 1094; 12 Id. 1454.

<sup>4</sup> 4 Ho. St. Tr. 431.

<sup>5</sup> 9 Ho. St. Tr. 608.

<sup>6</sup> *Adams v. Canon*, reported in the margin of the edition of Dyer's Reports, 1688, 53 b, pl. 11.

tice respecting proof were known to them: as, that at trials the party on whom the burden of proof lies ought to begin,<sup>1</sup> that leading interrogatories ought not to be put,<sup>2</sup> &c.

*In former times the principles of evidence were not embodied in binding rules.*

§ 114. But although the germs of our law of evidence are thus traceable in the proceedings of our ancestors, they do not appear to have reduced its principles into a system, or invested them with the obligatory force essential to the steady and impartial administration of justice. Except in the case of *præsumptiones juris* which, being part of the law itself, it would have been manifestly improper to disregard, and a few other instances, the principles of evidence were looked on as something merely directory, which judges and jurymen might follow or not at their discretion. The best illustration of this will be found in the practice relative to hearsay or second-hand evidence. We have seen that our ancient lawyers were perfectly aware of its weakness, but they did not think themselves called on to reject it absolutely. Thus in *Rolfe v. Hampden*, T. 34 Hen. VIII.,<sup>3</sup> in order to support a will of land, contained in an ancient paper writing (before the Statute of Frauds), the testimony of three witnesses was received, one of whom spoke of his own knowledge, the rest on the report of \*others; [ \* 155 ] and L. C. J. Dyer, by whom the case is reported, saw nothing extraordinary in this, but observes, "the jury paid little regard to the aforesaid testimony." And at a

*Anon.*, Litt. R. 36; *Heidon v. Ibyrave*, 3 Leon. 162, pl. 211; Gouldsb. 23, pl. 2.

<sup>2</sup> 4 Inst. 279.

<sup>3</sup> Dyer, 53 b, pl. 11.

later period the courts seem to have thought that, although hearsay was not evidence in itself, it might be used to introduce, explain, or corroborate more regular proof.<sup>1</sup>

§ 115. Instances are, however, to be found in the State Trials, previous to the revolution of 1688, of decisions going much beyond this, and the key to which lies in a circumstance commonly overlooked. So long as the judges believed that it was discretionary with them to enforce or disregard the received principles of evidence, it is natural to suppose that with the high prerogative notions of those times, and dependent as they were on the crown, they would exercise that discretion in favor of the crown, and carefully avoid laying down any general rules which might fetter the executive in proceeding against state criminals. Accordingly we find that in the sixteenth and early part of the seventeenth centuries, it was an open and avowed principle that the rules of evidence and practice on prosecutions for high treason, and perhaps for felony also, were different from those followed in ordinary cases.<sup>2</sup> Thus, although by the established usage of the common law from the earliest times, witnesses were sworn, examined, and cross-examined in open court, the judges refused to compel their personal appearance in cases of treason,<sup>3</sup> holding that it would be opening a gap for the destruction of the king,<sup>4</sup> &c. The consequence of \*establishing

[ \* 156 ] this distinction was, that on charges of that

<sup>1</sup> 2 Hawk. P. C. c. 46, s. 14, Ed. 1716; Bac. Abr. Evid. K., Ed. 1736; Trials per Pais, 389, 390; 1 Mod. 283.

<sup>2</sup> See 2 Hawk. P. C. c. 46, s. 9, and the authorities in the following notes.

<sup>3</sup> Staundf. P. C. 164.

<sup>4</sup> *Sir Walter Raleigh's case*, 2 Ho. St. Tr. 19. Hallam, in his *Constitutional History of England*, vol. 2, p. 148, 2nd Ed., speaking of the trial of the Earl of Strafford, says, that "in that age the rules of evidence, so scrupulously defined since, were either very imperfectly recognized, or continually transgressed"

nature not only was the loosest and most dangerous evidence received, but the entire proceedings were conducted in a way which set at defiance every principle of fairness and justice. "Throughout the state trials before the time of the Commonwealth," observes Mr. Phillipps,<sup>1</sup> "the worst species of hearsay was constantly received; such as the examinations of persons who might have been produced as witnesses, or who had been convicted of capital offenses, or who had signed confessions in the presence only of the officers of government, and under the torture of the rack." Thus, in the case of Sir Nicholas Throckmorton,<sup>2</sup> the principal evidence was the deposition of a person already convicted of treason, and whose execution had been respited from time to time in order to induce him to accuse the prisoner.<sup>3</sup> And among many flagrant misinterpretations of the law in favor of the crown and against the prisoner, of which that trial is full, the court unblushingly declared that the words in the Statute of Treason, 25 Edw. 3, c. 2, stat. 5, that persons accused of treason should "thereof be provably attainted of open deed, by people of their condition," meant that they should be attainted, not by verdict of a jury, but by the evidence of persons already attainted, who declare the accused participators in their treason, and are thus "people of their condition."<sup>4</sup> After the Restoration matters seem to have mended; the witnesses appeared in person, but the practice of admitting proof at second-hand continued,—the judges acknowledging that it was not evidence, and promising to tell the jury so.<sup>5</sup> Thus, in *Langhorn's*

<sup>1</sup> 1 Ph. Ev. 166, 10th Ed.

<sup>3</sup> 1 Ph. Ev. 166, 10th Ed.

<sup>2</sup> 1 Ho. St. Tr. 869.

<sup>4</sup> 1 Ho. St. Tr. 889.

<sup>5</sup> See *Langhorn's case*, 7 Ho. St. Tr. 441; *Lord William Russell's case*, 9 Id. 608; *Algernon Sidney's case*, Id. 848; *Charnock's case*, 12 Id. 1414 and 1454.

\**case*, 31 Car. II.,<sup>1</sup> Atkins, J., interposed while a witness was giving his testimony, "That is [ \* 157 ] no evidence against the prisoner, because it is by hearsay;" and Scroggs, C. J., added, "It is right, and the jury ought to take notice, that what another man said is no evidence against the prisoner, for nothing will be evidence against him but what is of his own knowledge." Notwithstanding this language, to quote again from Mr. Phillipps,<sup>2</sup> "On the trials for the Popish Plot, the evidence consisted principally of a narrative of the transactions of the supposed conspirators in various countries, collected during a long period of time from a multitude of letters, the contents of which were given from recollection; the witnesses not having taken a note of any part of the letters at the time of reading, not having read them for a great number of years, nor having been required in reading to notice their contents, and not producing one of the letters, or a copy, or even an extract."

*Origin of the modern "Law of Evidence" — Its characteristic feature, rules of evidence are rules of law — Gradual development of this principle.*

§ 116. The system known in practice by the title of the "Law of Evidence" began to form about the middle of the seventeenth century,—at least this is sufficiently accurate for a general view. The characteristic feature which distinguishes it, both from our own ancient system and those of most other nations, is that its rules of *evi-*

<sup>1</sup> 7 Ho. St. Tr. 441.

<sup>2</sup> 1 Ph. Ev. 166, 10th Ed. From the above observations it follows that too much reliance must not be placed on the valuable work called "The State Trials," as presenting a correct picture of the *ordinary* practice of English tribunals before the Revolution. It should not be forgotten that most of the cases there reported were prosecutions for high treason, and took place in times of great excitement.

dence, both primary and secondary, are in general rules of law ; which are not to be enforced or relaxed at the discretion of judges : but are as binding on the court, juries, litigants, and witnesses, as the rest of the common and statute law of the land ; and that it is only in the [ \* 158 ] forensic procedure which \*regulates the manner and order of offering, accepting, and rejecting evidence, that a discretionary power, and even that a limited one, is vested in the bench. A judge, consequently, has now no more right to receive prohibited evidence, because he thinks that by so doing justice will be advanced in the particular case, than he has to suspend the operation of the Statute of Mortmain, or to refuse to permit an heir-at-law to recover in ejectment, because it appears that he is amply provided for without the land in dispute. It must not, however, be supposed that this great principle became established all at once ; and indeed the gradual development of our system of judicial evidence, from the above epoch to the present day, may be studied alike with advantage and pleasure. To point out the various improvements and alterations that have from time to time been effected in it, by the courts and the legislature, would far exceed the limits of a mere sketch of its progress. It will therefore be sufficient to glance at a few particulars ; and we shall proceed in the first place with the history, during that period, of the rule rejecting hearsay evidence.

*History of the rule rejecting hearsay evidence.*

§ 117. Although, as already stated, the infirmity of hearsay evidence was generally acknowledged in the reign of Charles II.,<sup>1</sup> yet Sir Matthew Hale gave

<sup>1</sup> See *ante*, §§ 112, 115.



it as his opinion, that where a rape was committed on a child of tender years, the court might receive, as evidence, the child's narrative of the transaction to her mother or other relations. At the beginning of the eighteenth century, Serjeant Hawkins only ventures to lay down the rule thus,<sup>2</sup> "*it seems* agreed that what a stranger has been heard to say is *in strictness* no manner of evidence either for or against a prisoner;" \*and similar language is used in Bacon's Abridgment.<sup>3</sup> Lord Chief Baron Gilbert, also, in his [\* 159] Treatise on the Law of Evidence, composed about the same time, being it is believed the earliest on the subject, lays down that "a mere hearsay is no evidence;"<sup>4</sup> "but though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness's testimony, to show that he affirmed the same thing before on other occasions, and that the witness is still consistent with himself."<sup>5</sup> Still, in 1754, on the trial of Elizabeth Canning for perjury, we find some rather elaborately got up evidence tendered and rejected by the bench, the nature of which seems to show that the rule against hearsay was not then generally understood by the legal profession.<sup>6</sup> Toward the end of the eighteenth century, however, the text writers speak of the rule as established;<sup>7</sup> but while recognized as obligatory, it was not extended to all the cases which fall within its principle. Thus, so late as 1779, on a trial for assault with intent to ravish a very young child, we find Buller, J. (himself the author of a Treatise on Nisi Prius), adopting the course advised by Sir Matthew Hale about a century before, by receiving

<sup>1</sup> 1 Hale, P. C. 634, 635.

<sup>5</sup> Id. 150.

<sup>2</sup> 2 Hawk. P. C. c. 46, s. 14, Ed. 1716.

<sup>6</sup> 19 Ho. St. Tr. 342, 343.

<sup>3</sup> Bac. Abr. Evid. (K), Ed. 1736.

<sup>7</sup> Bull. N. P. 294; 2 Fonb. Eq. 450.

<sup>4</sup> Gilb. Ev. 149, 4th Ed.

as evidence the information relative to the transaction which the child, who was not examined as a witness, had given to two other persons. The point having been reserved, this course was condemned by all the judges; and a definite rule relative to the testimony of children laid down for the future.<sup>1</sup> Notwithstanding which, it is said that so late as 1808 the same objectionable kind of evidence was received on an indictment for a rape on a child five years old; but on a case reserved, the \*judges, [ \* 160 ] as might have been expected, thought it clearly inadmissible.<sup>2</sup> And an approved treatise of the present day informs us, that so late as the year 1790, the rule against the admission of hearsay evidence does not appear to have been settled with regard to depositions taken before magistrates (whether upon criminal charges or upon other occasions); and several of the exceptions to this rule have been much narrowed within very modern times.<sup>3</sup> The authors who have written on evidence during the current century, all speak of the rule rejecting hearsay evidence as established and notorious.<sup>4</sup> (a)

<sup>1</sup> *R. v. Brazier*, 1 Leach, C. L. 199.

<sup>2</sup> *R. v. Tucker*, MS.; cited Ph. & Am. Ev. 6, and 1 Ph. Ev. 10, 10th Ed.

<sup>3</sup> 1 Ph. Ev. 165-6, 10th Ed. See *Higham v. Ridgway*, 10 East, 109, and the cases there referred to; *R. v. Eriswell*, 3 T. R. 707; *R. v. Chadderton*, 2 East, 27; *R. v. Frystone*, Id. 54; *R. v. Aberguilly*, Id. 63.

<sup>4</sup> 2 Ev. Poth. 283, 284: and see any of the modern Treatises.

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(a) Hearsay evidence, as a general rule, is not admissible to establish a specific fact, that in its nature can be established by witnesses speaking from their own knowledge. *Chapin v. Taft*, 18 Pick. (Mass.) 379; *Page v. Parker*, 40 N. H. 47; *Sherwood v. Houston*, 41 Miss. 59; *Parker v. State*, 7 Blackf. (Ind.) 292; *Penfield v. Carpenter*, 13 Johns. (N. Y.) 350; *Bristol v. Dann*, 12 Wend. (N. Y.) 142; *Bailey v. Wood*, 24 Ga. 164; but to this rule there are numerous exceptions, which often render it difficult to determine when the general rule applies, and when it does not. It should be stated here, that hearsay evidence should never be confounded with *res gestæ*, and as to what is properly a part of the *res gestæ*, see note under that head, in vol. 2. Thus, hearsay evidence is sometimes admissible to confirm statements made by a witness, "to show that he affirmed

*Progress of other parts of the law of evidence during the last and present centuries.*

§ 118. Other parts of the law of evidence are marked by similar improvement during the last and present centuries. The enlightened principle, that judicial oaths are

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the same thing before, on other occasions, and that he is still constant to himself." *Halliday v. Sweeting*, Buller's N. P. 294. But it should be borne in mind that this only applies in cases where the testimony of the witness is sought to be impeached, by showing that he has made statements out of court inconsistent with the evidence given by him on trial, and even then it is not generally admissible. *Com. v. Jenkins*, 8 Gray (Mass.), 485; *Com. v. Casey*, 2 Brewst. (Penn.) 404; *Butler v. Truslow*, 55 Barb. (N. Y.) 293. So hearsay evidence, or evidence of general reputation for truth, is admissible in impeachment of a witness. So when the conduct of parties becomes material, evidence may be given as to what was said or done by them, at a time when there is nothing to excite a suspicion of collusion, or a purpose to make evidence. Thus, in an action of *crim. con.* (*Trelawney v. Coleman*, 1 B. & Ald. 90), it was held that letters written by the wife to the husband, as well as what was said by them, was admissible to show their demeanor and conduct toward each other. In the language of Lord Ellenborough, "to show whether they were living on better or worse terms." See also *Edwards v. Crock*, 4 Esp. 39, in which it was held that such evidence must be confined to letters that were written before there was any suspicion of adultery. So when the *animus* with which an act is done becomes material, evidence may be given not only of the acts, but also of the declarations of the party accompanying the act, or after it is completed. *Bartram v. Stone*, 31 Conn. 159. So where it becomes material to charge a person with notice of a given matter; as that a person living in the same place was insolvent at a particular time, evidence showing that he was generally reported to be, is admissible; but the insolvency of the party must first be established. *Sheen v. Bumpstead*, 2 Hurl. & Colt. (English) 193; *Ward v. Hurdon*, 5 Port. (Ala.) 382; *Stattings v. State*, 33 Ala. 425; and it seems that when the fact in issue is the pecuniary responsibility of a party, a witness may be allowed to state not only his opinion as to the person's solvency, from his personal acquaintance with him, but also what he has learned in reference to it from reputation in the community where he resides. *Hand v. Brown*, 18 Vt. 87; *Bank of Middlebury v. Rutland*, 33 id. 414. So when it becomes important to show the connection between facts, as to identify a particular occasion or date, a witness may state what was said by a third person, tending to fix the fact. *Hill v. North*, 34 Vt. 604; *State v. Fox*, 25 N. J. 566; or when a person's habits become material, as for industry, sobriety, etc., a witness may not only state what he knows from his own observation, but also what he has learned of the person's reputation in that respect in the community where he lives. *Hill v.*

not to be rejected on account of the witness holding erroneous notions on religion, provided a mode of swearing be found which he considers binding on his conscience, was

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*North, ante* ; but the fact of solvency or insolvency cannot generally be established by such evidence. It is merely admissible as tending to show that the parties had notice or knowledge of the fact, or might have had by reasonable inquiry. *Bank of Middlebury v. Rutland, ante* ; *Walker v. Forbes*, 25 Ala. 139 ; *Molyneaux v. Collier*, 13 Ga. 406 ; but in *Mussinger v. Knox*, 8 Minn. 140, it was held admissible to prove the fact. So in *Angell v. Rosenburg*, 12 Mich. 241, it was held that such evidence is admissible to show not only a person's pecuniary standing under certain circumstances—as an assignee—but even his actual insolvency, to establish fraud in the making of the assignment.

So, where it becomes important to show that notice was given to a party of a particular fact, or that certain inquiries were made of him material to one of the parties, as when an indorsee, before taking a note, sends it by messenger to the maker, with instructions to inquire whether it is business paper, the indorsee, after establishing such facts, may show what the messenger said on his return, by any person who heard the report, not only to show that such representations were made, but also to show that the answer was communicated to him before he took the note ; *Robbins v. Richardson*, 2 Bosw. (N. Y. S. C.) 248 ; so that a person was reputed to be a negro trader ; *Taylor v. Horsey*, 5 Harr. (Del.) 181 ; or had any general reputation that is in any wise material to the issue or collateral questions. *Stattings v. State*, 33 Ala. 425.

In *Jones v. Hatchett* 14 Ala. 743, evidence that the burning of a cotton warehouse was generally known in the town was admitted, as raising a presumption that the defendant, who lived some twenty or thirty miles away, knew the fact two months afterward, when he executed his note for an advance on cotton that he had stored there, and which was burned in the fire.

It is impossible to give all the instances in which such evidence may be given, as its admission in a given case rests largely in the discretion of the court, and depends upon its materiality, and the purpose for which it as offered, but there are certain general exceptions to the rule—as well established as the rule itself.

Thus it is a general rule that in matters of general or public interest, popular reputation or opinion, or the declarations of deceased witnesses, if made without reasonable suspicion of partiality or collusion, will be received as competent and credible evidence. *Wright v. Tatham*, 7 Ad. & El. 360 ; *Jennings v. People*, 8 Mich. 81 ; *Toole v. Peterson*, 9 Ired. (N. C.) 180.

"The principle" said Coltman, J., in *Wright v. Tatham, ante*, "on which I conceive this exception to rest, is this, that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject, and such concurrence is presumptive evidence of the existence of an ancient right, of which, in most cases, direct proof can no longer be given, and ought not to be expected ; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature, affecting a con-

fully established by the great case of *Omychund v. Barker* in 1745.<sup>1</sup> In later times, also, relief has been given to particular classes of persons, who object on conscientious

<sup>1</sup> 1 Atk. 21; 1 Willes, 538; Wils. 84.

siderable number of persons;" and Alderson, Baron, in the Exchequer, in the same case, 4 Bing. (N. C.) 528, in commenting upon the value of such evidence, and the safeguards afforded as to its verity, said:

"The general interest which belongs to the subject would lead to immediate contradiction from others unless the statements proved were true; and the public nature of the right excludes the probability of individual bias, and makes the sanction of an oath less necessary." See Powell on Evidence, 63, 64; *Weeks v. Sparks*, 1 M. & S. 679.

Thus traditionary reputation is admissible to establish the boundary between two parishes; *Morewood v. Wood*, 14 East, 331; *Reg. v. Sutton*, 8 Ad. & El. 516; *Newcastle v. Broxtome* 4 B. & Ad. 273; family traditions to prove a boundary, but not to establish title; *Clines' Heirs v. Catron*, 22 Gratt. 378; and old maps are admissible for that purpose where they have been kept in such a manner as to indicate that they have been generally recognized and acted upon by the parties; *Dunn v. Hayes*, 21 Me. 76; *Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Penny Pat. Landing v. Philadelphia*, 16 Penn. St. 69; Gilbert's Ev. 77; 2 Pothier, 292; as maps annexed to deeds of property where both derive title from same grantor, *Crawford v. Loper*, 25 Barb. (N. Y.) 449; but otherwise as to private maps or plots, even though annexed to a deed, if not recorded with it; *Shirras v. Caig*, 7 Cranch (U. S.), 34; *Griffith v. Tuckhouser*, Peters (U. S. C. C.), 418; otherwise they must be shown to have been made by public authority, or some person having personal knowledge of the matters therein shown. Their correctness must appear either from positive proof or fair presumption, and this is so whether ancient or modern. *Johnson v. Jones*, 1 Black. (U. S.) 209; *Stein v. Ashby*, 24 Ala. 521; *Jackson v. Van Dyke*, 1 N. J. 28; *Smith v. Strong*, 14 Pick. (Mass.) 128; *Surgett v. Doe*, 24 Miss. 118; *Com. v. Alburger*, 1 Whart. (Penn.) 469; *Wood v. Willard*, 36 Vt. 82; *R. R. Co. v. Banker*, 44 Ill. 26; *Mitchell v. Churchman*, 4 Humph. (Tenn.) 218. And reprints of old maps, by one who has no personal knowledge of the subject, are not admissible. *Chirac v. Reinecker*, 2 Pet. (U. S.) 619; *Hammond v. Broadstreet*, 23 L. J. (Ex.) 332.

So it is competent to show the market price of articles on a given day, by a newspaper containing a price current; *Cliquot's Champagne*, 3 Wall. (U. S.) 114; *Sisson v. Cleveland R. R. Co.*, 14 Mich. 489; *Henkle v. State*, 21 Ill. 238; so to show the arrival and departure of trains from a place; *Com. v. Robinson*, 1 Gray (Mass.), 555; so to show that a certain house was kept as a public house at a certain time, an advertisement at and before that time, inserted in a newspaper, by the proprietor, is competent evidence; *Stringer v. Davis*, 35 Cal. 25; but, where a party seeks to use an advertisement in a newspaper as evidence against a party or his privies, he must first show that it in fact emanated from him; *Somervell v. Hart*, 3 H. & M. (Md.) 596; *Mann v. Russell*, 11 Ill.

grounds to the taking oaths in any shape.<sup>1</sup> So the incompetency of witnesses, on the ground of interest, was extricated from the chaos of conflicting authority in which it lay

<sup>1</sup> *Infra*, bk. 2, pt. 1, ch. 2.

586; so to show the expectation of life at a certain age, printed copies of the Carlisle table are competent evidence; *Donaldson v. Miss., etc., R. R. Co.*, 18 Iowa, 280; but neither books, newspapers, or other printed matter not published under authority, are admissible to establish facts of history, science, or any facts that can be proved by witnesses having knowledge of the subject; *Wood v. Bank*, 14 N. H. 101; *Ashworth v. Kittredge*, 12 Cush. (Mass.) 193; *Carter v. State*, 2 Ind. 617; but as to medical works, see *Meeckle v. State*, 37 Ala. 139; *Bowman v. Woods*, 1 Greene (Iowa), 441; so hearsay evidence is competent to prove the death of a person. Thus, in *Mason v. Fuller*, 45 Vt. 29, it was held that a wife's testimony that her husband died at a certain time, but that the only knowledge she had on the subject was what had been told her by his folks, was competent to be given on the question of the husband's death. See, also, *Secrist v. Green*, 3 Wall. (U. S.) 744; *Jackson v. Bonehan*, 15 Johns. (N. Y.) 226; *Morrill v. Foster*, 83 N. H. 379; *Anderson v. Parker*, 6 Cal. 197; *Morton v. Barrett*, 19 Me. 109; *Eastman v. Martin*, 19 N. H. 152; *Hummell v. Brown*, 24 Penn. St. 310; *Wilson v. Brownlee*, 24 Ark. 586; *Scott v. Ratchiffe*, 5 Peters (U. S.), 81; so general reputation as to the legitimacy of a person is competent evidence; *Gaines v. New Orleans*, 6 Wall. (U. S.) 642; *Stegall v. Stegall*, 2 Brock. (U. S.) 256; so the declarations of a deceased member of the family are competent evidence upon the question of legitimacy; *Jewell v. Jewell*, 17 Peters (U. S.), 213; or the declarations of a father, deceased; *Gaines v. New Orleans, ante*; or of a mother, if deceased; *Stegall v. Stegall, ante*; so a marriage may be proved by general reputation, or the declarations of a deceased member of the family; *Morgan v. Purnell*, 4 Hawks. (N. C.) 95; but that parties living together as husband and wife were *not* married, cannot be proved by reputation or belief; *Henderson v. Cargill*, 31 Miss. 367; *Carrie v. Cumming*, 26 Ga. 690.

Hearsay evidence is admissible to prove pedigree, when the facts are ancient and not susceptible of better proof; *Moers v. Bunker*, 29 N. H. 420; *Jackson v. Cootly*, 8 Johns. (N. Y.) 128; *Conjolle v. Ferrie*, 26 Barb. (N. Y.) 177; *Greenwood v. Spiller*, 3 Ill. 502; *Kelly v. McGuire*, 15 Ark. 555; *Westfield v. Warren*, 8 N. J. 249; *Speed v. Brooks*, 7 J. J. Marsh. (Ky.) 119; *Crawford v. Blackburn*, 17 Md. 49; *Kaywood v. Barnett*, 3 Dev. & B. (N. C.) 91. See note on pedigree, vol. 2; also to establish ancient boundaries; *Wood v. Willard*, 27 Vt. 377; *Adams v. Stagnan*, 24 N. H. 405; *Wooster v. Butler*, 13 Conn. 309; *Hall v. Gittings*, 2 H. & J. (Md.) 112; *St. Louis v. Risley*, 40 Mo. 356; *Dibble v. Rogers*, 13 Wend. (N. Y.) 536; but not to establish title; *Wendell v. Abbott*, 45 N. H. 349; *Porter v. Warner*, 2 Root (Conn.), 22.

Of the character or value of this class of evidence, it is not important, in view of the very general rule admitting it, to say much, as there is but little

involved, and placed on at least an intelligible footing, by the case of *Bent v. Baker*<sup>1</sup> in 1789, and other decisions of that period. In our own time this latter subject has

<sup>1</sup> 3 T. R. 27. See Ph. & Am. Ev. 74, 75.

prospect that any thing that can be said will change the rule or stay the rapid relaxation of the rule opposed to its admission, but I cannot forbear giving what was said by Mr. Stuart, in a letter addressed to Lord Mansfield, upon the inefficiency of such evidence. The occasion of this letter was the admission of some very loose hearsay evidence in the *Douglass Case*.

"Hearsay evidence," said he, "is, in general, of very little consequence, and ought never to be regarded except when, for want of direct and positive proof, the judge is necessitated to give a determination even upon such slight probabilities as are laid before him. For, besides that testimony of this kind is weakened by its removal from its first source, it is liable from its very nature to important objections which greatly diminish its authority. Very few persons impose on themselves such strict rules of veracity that every word that drops from them in conversation can be regarded as a judicial testimony. Vanity, self-interest, love of talkativeness, a variety of motives even the most frivolous, make people indulge themselves in fictions of this nature, and they think themselves the more secure both because a detection is not attended with any important consequences, and because their companions never dream of sifting their story or examining circumstances, so as to make detection possible.

"If such narratives have small authority when repeated at first hand, what weight is due to them when repeated after an interval of many years, by persons in no way interested in the original event? The memory of men is never so tenacious as to retain, with any tolerable exactness, circumstances which entered merely by the ear, which could at first make but a slight impression upon them, and which they never, during a very long interval, had any occasion to recollect. Every person's experience may convince him that no conversation was ever repeated by four or five persons, even next day, without some material variations, and, sometimes, contradictions in the circumstances. But if innocent error be so natural, and even unavoidable in such testimony, what must be the case where the least suspicion of fraud, or corruption, or even partiality is allowed to enter? A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entered on his dead or absent author." See Mr. Evans' Notes to Pothier, Vol. 2, p. 296.

That this class of evidence should be rigidly scanned, and carefully weighed, where any important result depends upon the issue, is a fact that readily suggests itself to the mind of every person. There is such extreme danger that it is unreliable, if not fabricated, that it should always be received and scanned with suspicious caution.

[ \* 161 ] \*attracted much attention — the doctrine of the incompetency of witnesses having been attacked in toto as improper and mischievous,<sup>1</sup> and being now almost annihilated.<sup>2</sup> By various recent statutes also many species of documents have been invested with the character of public documents, and made evidence against all persons of the facts which they record or attest;<sup>3</sup> the proof of public documents in general has been rendered more simple and less expensive;<sup>4</sup> proof of certain things which it may fairly be deemed needless to prove, has been dispensed with;<sup>5</sup> liberal powers of amending variances at trials have been vested in tribunals;<sup>6</sup> and more effective means afforded to litigants, of getting at evidence in the custody or under the control of the opposite party.<sup>7</sup> While these alterations must on the whole be viewed as improvements, it may be a question whether they have not, in some cases, been carried too far. The principle which attaches so much faith to public documents, for instance, rests in a great degree on the rule,—“*Omnia præsumuntur ritè esse acta*,”—a maxim unquestionably just when restrained within its due limits, but which loses much of its force when the document is only of a *quasi* public nature, *i. e.*, drawn up by individuals acting in some sense indeed on the part of the public, but having

<sup>1</sup> Benth. Jud. Ev. vol. i. 1–15; vol. v. 1–191, &c., &c.; Taylor. Ev. §§ 1210 *et seq.*, 4th Ed. See this subject considered *infra*, bk. 2, pt. 1, ch. 2.

<sup>2</sup> *Infra*, bk. 2, pt. 1, ch. 2.

<sup>3</sup> 8 & 9 Vict. c. 16; 14 & 15 Vict. c. 99; 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 67, &c.

<sup>4</sup> 8 & 9 Vict. c. 113; 14 & 15 Vict. cc. 99 and 100; 17 & 18 Vict. c. 104, ss. 107, 138, 175, N. 3, 249, 277; 18 & 19 Vict. c. 91, s. 15; 20 & 21 Vict. c. 77, s. 91; 31 & 32 Vict. cc. 37 and 54.

<sup>5</sup> 8 & 9 Vict. c. 113; 11 & 12 Vict. c. 42, s. 17; 14 & 15 Vict. c. 99; 17 & 18 Vict. c. 104, s. 270, &c.

<sup>6</sup> *Infra*, bk. 3, pt. 1, ch. 3.

<sup>7</sup> 14 & 15 Vict. c. 99, s. 6; 17 & 18 Vict. c. 125, ss. 50, 51 *et seq.*



a personal interest in the existence of the facts they profess to record or attest; and there is another maxim equally \*valuable which must not be lost sight of,—“*Res inter alios acta alteri nocere non debet.*” [ \* 162 ] In one instance at least—that relating to entries in the official log-books of merchant ships—the legislature found it necessary to retrace its steps in this respect;<sup>1</sup> and several cases illustrate the danger of the enactments in the 8 & 9 Vict. c. 16, s. 28, and 25 & 26 Vict. c. 89, s. 37, which, in an action by a railway company for calls, render the register of shareholders *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares.<sup>2</sup> And, lastly, by “The Common Law Procedure Act, 1854,”<sup>3</sup> various anomalies have been removed from the forensic procedure affecting our law of evidence, and the system itself brought more into harmony with its own principles. The value of this statute was much impaired, by its operation being confined to the evidence given in civil cases;<sup>4</sup> but this has been remedied by the 24 & 25 Vict. c. 66, the 28 Vict. c. 18, and the 32 & 33 Vict. c. 68.

<sup>1</sup> See the 13 & 14 Vict. c. 93, ss. 85–93, and the alterations introduced by the amending act, 14 & 15 Vict. c. 96, s. 27. Both these statutes are repealed by the 17 & 18 Vict. c. 120; and by the Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 244 and 285, the provisions in the 14 & 15 Vict. c. 96, s. 27, as to the admissibility in evidence of the official log-books of merchant vessels, have been re-enacted with still further improvements.

<sup>2</sup> *Waterford Railway Company v. Pidcock*, 8 Exch. 279; *Nixon v. Brownlow*, 3 H. & N. 686. In *Darby v. Ouseley*, 2 Jurist, N. S. 497, 499, also, Pollock, C. B., said that there were many instances of the names of persons having been inserted without their knowledge in the books of railway companies.

<sup>3</sup> 17 & 18 Vict. c. 125, ss. 22–27.

<sup>4</sup> Sect. 103.

*Cause of the slow development of the law of evidence in England—The substantive rules of law come to maturity before the adjective—Secondary causes of the establishment of our modern system of evidence.*

§ 119. The slow development of the law of evidence, compared with the other branches of our jurisprudence, seems a natural consequence of the general principle, that in every nation the substantive rules of law arrive at maturity before the adjective. The reason is obvious.

[ \* 163 ] \*Rules defining the rights of persons and property, or creating offenses and assigning their punishment, are almost coeval with the existence of civil society; while the procedure, or mode of enforcing rights and carrying the sanctions of penal law into effect, are usually left for a long time, and to a certain extent ever must be left, to the discretion of the persons intrusted with the administration of justice. But our modern system of evidence probably owes its establishment to the following *secondary* causes:—1. The independence of the judges on the crown, begun by the 12 & 13 Will. 3, c. 2, s. 3, and completed by the 1 Geo. 3, c. 23, which naturally had a considerable effect in preventing artificial distinctions being made between the proofs in state prosecutions and in other cases. 2. The allowing persons accused of treason or felony the right of being defended by counsel;<sup>1</sup> the necessary consequence of which was that objections to the admissibility of evidence were much more frequently taken, the attention of the judges was more

<sup>1</sup> In treason, by 7 & 8 Will. 3, c. 3, s. 1; and 20 Geo. 2, c. 30. Although persons accused of felony were not allowed to make their full defense by counsel until the 6 & 7 Will. 4, c. 114, yet for a long time before that statute, counsel were allowed to take and to argue legal objections for them, and even by connivance to examine and cross-examine witnesses. See bk. 4, pt. 1.

directed to the subject of evidence, their judgments were better considered, and their decisions more fully reported, and better remembered. 3. And principally, the gradual change effected in the constitution of the common law tribunal for the trial of matters of fact. As Serjeant Stephens observes, "it is a matter clear beyond dispute (but one that has perhaps been too little noticed in works that treat of the origin of our laws) that the jury anciently consisted of persons who were *witnesses* to the facts, or at least in some measure *personally cognizant* of them; and who, \*consequently, in their verdict gave, not (as now) the conclusion of their judgment upon [ \* 164 ] facts proved before them in the cause—but their testimony as to facts which they had antecedently known."<sup>1</sup> This circumstance, which is a key to so many of the common-law rules of pleading, will throw considerable light on our system of judicial evidence. That the jury were witnesses of a particular kind, at least as late as the reign of Edw. I., and that they had ceased to be such in that of Charles II., perhaps much sooner, is indisputable. But in the meantime the system was in a sort of transition

<sup>1</sup> Steph. Plead. 145, 5th Ed. See, also, Id. 480, and Append. note 33. To his authorities, which are indeed conclusive enough on this matter, we add the following: It was agreed by the court in *Rolfe v. Hampden*, T. 34 Hen. VIII. Dyer, 53 b, pl. 11, that the plaintiff in attainder could not give more evidence nor call more witnesses than he had given to the petit jury, but *à contra* the defendant might give more in affirmance of the first verdict. The functions of jurors and the distinction between them and other witnesses is strikingly pointed out in 23 Ass. pl. 11. It was proposed to challenge a witness to a deed because he was cousin to the plaintiff. "Et non allocatur, for the witnesses are not challengeable, because the verdict shall not be received from them, but from those of the assize, and the witnesses were sworn simply to say the truth, without saying to their knowledge (a lour estient), for they ought to testify nothing but what they *see* and *hear*." The same was held in the 12 Ass. pl. 11 & 41, in the former of which we are told, "The assize (the jury) came and were charged to say the truth of their knowledge (a lour science), and the witnesses without their knowledge (sans lour scient), to say the truth and loyally inform the inquest." See, also, 11 Ass. pl. 19.

[ \* 165 ] state ;<sup>1</sup> and it was not until the final \*determination of that state that the rules of evidence, which depend so much on the functions of the component

<sup>1</sup> The authorities in the last note show how this stood in the time of our early Plantagenet monarchs; the celebrated judgment of Vaughan, C. J., in *Bushell's case*, Vaugh. 135, fixes the practice in the latter part of the seventeenth century, nearly as it exists at the present day. The difficulty is to trace its progress in the intervening period. Fortescue, De Laud. Leg. Ang. cc. 26, 32, toward the close of the fifteenth century, considers the jury in the light of witnesses. Vavisor, J., a little later, in the 14 Hen. VII., 29 b, pl. 4, 2 Rol. Ab. 677, pl. 27; and Brooke, Recorder of London, *arguendo*, in the middle of the next century, *Reniger v. Fogassa*, Plowd. 12, H. 4 Edw. VI., state it as clear that a jury may find their verdict without any evidence laid before them. So Staundf. P. C. 130 a, speaking of the stat. 1 Edw. 6, c. 12, says, "Mes bien garda le iuge, quant tielx parolx sont mises in lenditement, que ceux qui donont evidence, les dites parolx biē et substantialment prouont per lour evidence, auxi auant come le principal fact, et sils ne font, lessa le iuge admonisher le iury de ceo, s. que il ny ad aucun prooofe de tielx polx per le evidence, et per tant nient tenus de le trouer, *sils ne conusteront c' de eux mesmes*." "Albeit by the common law," says Sir Edward Coke, 3 Inst. 163, "trial of matters of fact is by the verdict of twelve men, &c., and depositions of witnesses is but evidenced to them; yet, for that *most commonly* juries are led by deposition of witnesses, &c." So late as the 17 Jac. I. (1619) Hobart, C. J., says (*Darcy v. Leigh*, Hob. 335), that he "observed the wisdom of the common law did allow none to be a juryman in *ætate probandâ*, that was not forty-two years; for he tried things twenty-one years past, and is not to be a juror till he be twenty-one years." And in Style's Prac. Reg. 335, 4th Ed. "A jury may find a thing which is not given unto them in evidence, if they do know it of their own knowledge, M. 22 Car. B. R. For they may inform themselves of the truth of the fact they are to try by all possible and lawful means they can, and are not solely tied to the evidence given at the bar." On the other hand, however, we find a case of *Lee v. Savile*, in Clayton's Pleas of Assize, 31, pl. 54, Summer Assizes, 11 Car. I. (1635), where it is stated that "the judge" (Barkley) "did put back the jury twice because they offered their verdict contrary to their evidence." The following case is reported in 1 Lilly, Pr. Reg. 552. "If any one of the jury that is sworn to try the issue be desired to give his testimony concerning some matter of fact, that lies in his particular knowledge and concerns the matter in question, as evidence to his fellow jurors, the court will have him examined openly in court upon his oath touching his knowledge therein, and he is not to deliver his testimony in private unto his fellow jurors; 31 Oct. 1650, Mich. B. S. &c." And in *Wood v. Gunston*, M. 1655, Sty. 466, referred to in *Roe v. Hawkes*, 1 Lev. 97, a motion for a new trial having been made on the ground of excessive damages, and that the jury had favored the plaintiff; it was objected, that "after verdict the partiality of the jury ought not to be questioned, nor is there any precedent for it in our books

\*parts of the judicial tribunal being clearly defined, could assume a permanent and consistent form. [ \* 166 ] Other causes may have contributed, and indeed the above are only offered in the way of speculation.

*The English system of judicial evidence a noble one, taken as a whole — Defects in the system.*

§ 120. But, whatever the age or origin of our system of judicial evidence, it is on the whole a noble one, and may fearlessly challenge comparison with all others. Its principal features stand out in strong and fine relief, while its leading rules are based on the most indisputable principles of truth and common sense. It must not, however, even with all the improvements of modern legislation, be supposed perfect; on the contrary, it still has defects which its well-wishers behold with regret. The application of its great rules having occasionally fallen to the lot of unskillful or careless hands, the general outline has been in some places badly filled up, lines cross that ought to bound the domain of principles just in themselves, and the extension of which to cases where they are inapplicable has frequently been productive of injustice, and exposed the whole system to censure. Add to this, that the compar-

of the law, and it would be of dangerous consequence if it should be suffered, and the greatness of the damages given can be no cause for a new trial;” but Glyn, C. J., said, “It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them, and it is for the people’s benefit that it should be so, for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended of the court.” In *Bayly v. Boorne*, 1 Str. 392, however, the court said the power of granting a new trial even in superior courts “is not of any great standing, the first instance of any new trial being in *Stiles*.” These authorities are far from exhausting the subject, but it is needless to discuss it farther.

atively modern growth of the system has rendered it impossible to get rid at once either of all the erroneous principles, or of the many straight-laced applications of sound ones, [ \* 167 ] \*which were established by our ancestors for themselves, or borrowed from the civilians of the middle ages.

§ 121. But besides these imperfections, which perhaps may be looked on as adventitious, our system has faults of a more positive kind. Thus, sufficient attention was not paid by its founders to *official pre-appointed evidence*; and although some steps have been taken in this direction by the 6 & 7 Will. 4, c. 86, and subsequent statutes for the registration of births, marriages and deaths; by the 1 & 2 Vict. c. 110, s. 9, and the 32 & 33 Vict. c. 62, s. 24, requiring professional attestation to cognovits and warrants of attorney to confess judgment; by various clauses of the Merchant Shipping Act, 17 & 18 Vict. c. 104;<sup>1</sup> and by the 20 & 21 Vict. c. 77, s. 91, establishing depositories for the wills of living persons, &c., there is still room for improvement; and the principles adopted in the laws of some foreign countries on this subject might, under due restrictions and with the required caution, be advantageously introduced here. Another defect of our system is the want of some cheap and expeditious means of perpetuating testimony. “*Id observandum, aliquando hodie probationem suscipi ante litem contestatam, si reus prævideat, se conventum iri, et periculum sit, ne testes, quibus exceptionem suam judici probare queat, moriantur, vel alio migrent, vel si actor metuat, ne sibi testimonium propter testium morbum, vel absentiam pereat. Id quod doctores vocant probationem in perpetuam rei memo-*

<sup>1</sup> Sects. 107, 138, 175, n. 3, &c.

*riam.*"<sup>1</sup> With the exception of the writs of "warrantia chartæ,"<sup>2</sup> "curiâ claudendâ"<sup>3</sup> (both abolished by the 3 & 4 Will. 4, c. 27, s. 36), and a few other instances, the common law did not allow legal proceedings on the mere suspicion \*of intended wrong or breach of duty; and it [ \* 168 ] was probably in furtherance of this principle that it provided no general mode of perpetuating testimony, for which purpose it was necessary to have recourse to a bill in equity.<sup>4</sup> But that process is circuitous, expensive, and frequently inadequate; and there can be little doubt that much valuable evidence is daily carried to the grave. It is however much easier to detect the disease than to point out the fitting remedy; and the difficulty of this subject has been felt by the lawgivers of other countries as well as our own.<sup>5</sup> Steps in advance have, however, been taken by the 5 & 6 Vict. c. 69, and 30 & 31 Vict. c. 35, s. 6, passed to extend the means of perpetuating testimony in certain cases; by the Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 448, 449, relative to taking the examination of persons belonging to ships in distress; by the 21 & 22 Vict. c. 93, which enables persons to establish their legitimacy and the marriage of their parents and others from whom they may be descended, and to prove their own right to be deemed natural born subjects; and by the annual Mutiny Act<sup>6</sup> as to the mode of recording the settlements of soldiers, &c.

§ 122. Finally, the nomenclature of this branch of our jurisprudence is somewhat objectionable; a greater evil

<sup>1</sup> Heinec. ad Pand. pars 4, § 125.

<sup>2</sup> F. N. B. 134 K, 8th Ed.

<sup>3</sup> F. N. B. 127 I, in marg. 8th Ed.

<sup>4</sup> 3 Blackst. Comm. 450; Com. Dig. Chancery R.; 2 Phill. Ev. 453, 10th Ed.

<sup>5</sup> See Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 3.

<sup>6</sup> See the last of them, 32 & 33 Vict. c. 4, s. 92.

than might at first sight be imagined. Among the abuses of words one of our ablest metaphysicians classes the unsteady application, and affected obscurity by wrong application of them :<sup>1</sup> and Lord Bacon shrewdly remarks, "Although we think we govern our words, and prescribe [ \* 169 ] it well 'loquendum ut vulgus, \*sentiendum ut sapientes,' yet certain it is that words, as a Tartar's bow, do shoot back upon the understanding of the wisest, and mightily entangle and pervert the judgment."<sup>2</sup> Several important phrases in the law of evidence; such as "presumption," "is best evidence," "written evidence," "hearsay evidence," "parol evidence," &c., have two, and some even more, different significations; and many idle arguments and erroneous decisions to be found in our books are clearly traceable to this ambiguity of language.

<sup>1</sup> Locke on the Human Understanding, bk. 3, ch. 10, §§ 5, 6.

<sup>2</sup> Bacon's Advancement of Learning, bk. 2.



## \* BOOK II.

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### INSTRUMENTS OF EVIDENCE.

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#### *Instruments of evidence — Three kinds.*

§ 123. By “Instruments of Evidence” are meant the media through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal.<sup>1</sup> The word “instrument” has, however, both with ourselves and the civilians, a secondary sense, *i. e.*, denoting a particular kind of document.<sup>2</sup> These instruments of evidence are of three kinds:

1. “Witnesses:”—persons who inform the tribunal respecting facts.
2. “Real Evidence”—evidence from things.
3. “Documents”—evidence supplied by material substances, on which the existence of things is recorded by conventional marks or symbols.

Although in natural order the subject of real evidence precedes that of witnesses, it will be more convenient to treat of the latter first, as it is by means of them that both real and documentary evidence are usually presented to the tribunal.

<sup>1</sup> “Instrumentorum nomine ea omnia accipienda sunt, quibus causa instrui potest: et ideo tam testimonia, quam personæ instrumentorum loco habentur.” Dig. lib. 22, tit. 4, l. 1.

<sup>2</sup> See *infra*, pt. 3, and Heinec. ad Pand. pars 4, § 126.

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## \* PART I.

## WITNESSES.

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*Witness — what — Division of the subject.*

§ 124. A witness may be defined, a person who gives evidence to a judicial tribunal.<sup>1</sup> The term is also sometimes used in the sense of testimony, as when a witness is said to be “an evidence” for or against a party. This form of speech is, however, passing away, and is rarely used, except when a criminal is admitted to bear testimony against his accomplices, who is then said to turn “Queen’s evidence.” In dealing with this subject, we propose to consider —

1. What persons are compellable to give evidence.
2. The incompetency of witnesses; or, who are disqualified from giving evidence.
3. The grounds of suspicion of testimony.

<sup>1</sup> “Witness” seems perfectly synonymous with the Latin “testis,” the etymology of which is somewhat difficult to trace. Ainsworth in his Latin Dictionary says, etym. in obscuro: but Stephan. Thesaurus Ling. Lat. says it is “ab eo dictus quòd tueatur statum causæ: vel quòd ante stet, quasi antestis, id est antestans.” The “licet antestari” in Horace (Sat. lib. 1, 9), certainly gives some color to this latter supposition, which is followed by most of the civilians. See Calvin’s Lexicon Juridicum; Oldendorp’s Lexicon Juris; Spiegelius’s Lexicon Juris Civilis. The silence of our Law Dictionaries as to the derivation of “witness” is also remarkable. Sir Edward Coke, 4 Inst. 279, says it comes from the Saxon verb “Weten” (probably a mistake for witan), “Scire, quia de quibus sciunt testari debent, et omne sacramentum debet esse certæ scientiæ.” The derivations given by this author are rather unsafe; but the Dictionaries of Bailey, Johnson, Richardson and Webster all agree that “witness” is of Saxon origin; and we still have the phrase “to wit.”

## \*CHAPTER I.

[\*172]

## WHAT PERSONS ARE COMPELLABLE TO GIVE EVIDENCE.

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*Generally, all persons are compellable to give evidence —  
Exception — the Sovereign.*

§ 125. The law allows no excuse for withholding evidence which is relevant to the matters in question before its tribunals, and is not protected from disclosure by some principle of legal policy. A person therefore, who, without just cause, absents himself from a trial at which he has been duly summoned to attend as a witness; or a witness who refuses to give evidence, or to answer questions which the court rules proper to be answered, is liable to punishment for contempt.<sup>1</sup> An

<sup>1</sup> The following case has been put in illustration of the universality of this rule: — “ Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper and the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No! most certainly not.” — Bentham’s Draft of a Code for the Organization of the Judicial Establishment in France, A. D. 1790, chap. 1, tit. 1. “ We remember one case,” says a writer in a legal periodical, “ a prosecution for blasphemy, in which the defendant, by way of showing the divided state of opinion on theological subjects, actually subpoenaed the heads of all the religious persuasions he could hear of, and when the day of trial arrived these found themselves all shuffled up together in the waiting-room — the Archbishop of Canterbury and the High Priest of the Jews being of the party.” — Law Mag. vol. 25, p. 364. When the Emperor Napoléon the First was on board the Bellerophon in the English waters, an attempt was made to detain him in this country by means of a subpoena to give evidence on a trial, but which it was found impossible to serve. Scott’s Life of Napoléon, vol. 9, p. 96.

[ \* 173 ] \*exception exists in the case of The Sovereign, against whom, of course, no compulsory process of any kind can be used.<sup>1</sup>

*Privilege of witnesses in not answering particular questions — Questions tending to criminate, or expose to penalty or forfeiture.*

§ 126. Various matters privileged from disclosure on general grounds of public policy will be considered in another part of this work.<sup>2</sup> But besides these, the law extends a *personal* privilege to witnesses, of declining to answer particular questions, — a privilege based on the principle of encouraging all persons to come forward with evidence in courts of justice, by protecting them as far as possible from injury or needless annoyance in consequence of so doing. It is therefore a settled rule that a witness is not to be compelled to answer any question, the answering which has a tendency to expose him to a criminal prosecution, or to proceedings for a penalty, or for a forfeiture even of an estate or interest. “Nemo tenetur seipsum accusare.”<sup>3</sup> “Nemo tenetur seipsum prodere.”<sup>4</sup> This is laid down in all our books,<sup>5</sup> is the established practice of the courts, and is recognized by the stat. 46 Geo. 3, c. 37;<sup>6</sup> 26 & 27 Vict. c. 29, s. 7, &c. By 1 Will. 4, c. 22, s. 5, and 6 & 7 Vict. c. 82, s. 7, no witness examined under a commission shall be compelled to produce any writing or other document that he would not

<sup>1</sup> See *infra*, chap. 2.

<sup>2</sup> Bk. 3, pt. 2, ch. 8.

<sup>3</sup> Hard. 139; Wing. Max. 486; Lofft. Max. 361; 10 Exch. 88; 3 H. & N. 363.

<sup>4</sup> 3 Bulst. 50; 4 Black. C. 296; 3 Mac. & G. 212; 10 Exch. 93; 2 Den. C. C. 434.

<sup>5</sup> Ph. & Am. Ev. 913, 914, 916; Tayl. Ev. § 1308, 5th Ed.; Stark. Ev. 204, 4th Ed.

<sup>6</sup> See that statute, *infra*.

be compellable to produce at a trial, &c.; and the 14 & 15 Vict. c. 99, which (sect. 2) renders the parties to a cause competent \*and compellable to give evidence according to the practice of the court; [ \* 174 ] expressly provides (sect. 3) that nothing therein contained "shall render any person compellable to answer any question tending to criminate himself." The 19 & 20 Vict. c. 113, s. 5, for taking evidence here in relation to certain matters pending before foreign tribunals, enacts that every person examined under it "shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause, &c., would be entitled to;" and a similar provision is contained in the 22 Vict. c. 20, s. 4, for taking evidence in proceedings pending before tribunals in the Queen's dominions, in places out of their jurisdiction, with reference to persons examined under that act. Whether a husband or wife is bound to answer questions tending to criminate each other seems unsettled.<sup>1</sup> And, lastly it is provided, by the 32 & 33 Vict. c. 68, s. 3, that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.<sup>2</sup> The peculiar language of the 14 & 15 Vict. c. 99, has given rise to the question, whether, when a party to a suit is examined as a witness, his

<sup>1</sup> See *R. v. The Inhabitants of Oliviger*, 2 T. R. 263; *R. v. The Inhabitants of All Saints, Worcester*, 6 M. & S. 194, 200, per Bayley, J.; *Cartwright v. Green*, 8 Ves. 405, 410.

<sup>2</sup> The legislature has also recognized the principle on several other occasions, either by depriving particular witnesses of the privilege, or by an act of indemnity rendering it valueless to them. Tayl. Ev. § 1310, 5th Ed., where various instances are collected.

privilege in not answering questions is not more limited than that of other witnesses, and confined to the case where the answer would tend to *criminate* him.<sup>1</sup>

[ \* 175 ] \* § 127. The question need not be such that the answer to it would *directly* affect with criminality the witness or party interrogated, or subject him to a penalty or forfeiture; it is sufficient if the answer would form a link in a chain of evidence which might induce any of those consequences.<sup>2</sup> In one case,<sup>3</sup> Pollock, C. B., went farther, laying it down, incidentally, for it was unnecessary to the decision of the point before the court, that it did not at all follow that the witness who is privileged from answering must be guilty of an offense; that a man may be placed in such circumstances connected with the commission of a crime, that if he disclosed them he would be fixed on by his hearers as the guilty person, and he might not be able to explain those circumstances, so that the rule is not always the shield of guilt — it may be the protection to innocence. In the absence of more distinct authority, it is not easy to say whether this notion is well founded. Possibly such cases may fall within one or both of the principles, “*Nemo tenetur seipsum accusare*,”<sup>4</sup> “*Nemo tenetur se infortuniis et periculis exponere*,”<sup>5</sup> in furtherance of the latter of which, a party under the necessity of making continual claim to lands

<sup>1</sup> Tayl. Ev. § 1217, 5th Ed.; *May v. Hawkins*, 11 Exch. 210; 1 Jurist, N. S. 600.

<sup>2</sup> *Fisher v. Ronalds*, 12 C. B. 765, per Maule, J.; *Osborn v. The London Dock Company*, 10 Exch. 701, per Alderson, B.; *The People v. Mather*, 4 Wend. 253; *Paxton v. Douglas*, 19 Ves. 226, 227; *Short v. Mercier*, 3 Mac. & G. 218; Mitford's Pl. 359, 5th Ed.

<sup>3</sup> *Adams v. Lloyd*, 4 Jurist, N. S. 593; *S. C.*, 3 H. & N. 363.

<sup>4</sup> *Suprà*, § 126.

<sup>5</sup> Co. Litt. 253 b.

was not bound to approach them more closely than was consistent with his personal safety.<sup>1</sup> (a)

§ 128. When the grounds of privilege are before the court, it is for the court, and not for the witness or party interrogated, to decide as to their sufficiency.<sup>2</sup> But \* much difference of opinion has been expressed of late years, as to whether, if a witness or party [\* 176] interrogated objects to answering a particular question, alleging on oath that the answer would tend to expose him to crimination, penalty, or forfeiture, the court is bound to disallow the question, even though it does not see in what possible way the answer to it could have that effect. This question arose in *R. v. Garbett*,<sup>3</sup> on a case reserved, which was, however, ultimately decided on another point. In *Fisher v. Ronalds*,<sup>4</sup> Jervis, C. J., and Maule, J., laid down in the most unequivocal terms, that

<sup>1</sup> Litt. sect. 419 *et seq.*

<sup>2</sup> In *Re The Mexican and South American Company, Ex parte Aston*, 27 Beav. 474, affirmed on appeal, 4 De Gex & J. 320; *Ex parte Fernandez*, 10 C. B., N. S. 3, 40, per Willes, J.

<sup>3</sup> 1 Den. C. C. 236; 2 Car. & K. 474.

<sup>4</sup> 12 C. B. 762; 22 L. J., N. S., C. P. 62; 17 Jurist, 393.

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(a) In several well-considered cases in the courts of this country, a similar rule has been established, and it may be regarded as the rule, that, in order to excuse a witness from giving evidence on the ground that his evidence would criminate him, it is not necessary that the answer should have that *direct* result. It is sufficient if the answer would *tend* to criminate him, by pointing out to the prosecuting officer the means by which his conviction might be secured, or would serve to supply a link in a chain of evidence that would criminate him; *Printz v. Cheeney*, 11 Iowa, 469; *People v. Mather*, 4 Wend. (N. Y.) 429; *Richman v. State*, 2 Greene (Iowa), 532; *Com. v. Howell*, 5 Gratt. (Va.) 664; *Byass v. Smith*, 4 Bosw. (N. Y.) 679; *People v. Kelly*, 24 N. Y. 74; or when his answer will *tend* to disgrace him. *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *Vaughn v. Paine*, 2 Penn. St. 728; or will accuse him of an immoral act; *Galbraith v. Eichelberger*, 3 Yeates (Penn.), 515; or *tend* to make him infamous. *People v. Herrick*, 13 Johns. (N. Y.) 82; *United States v. Craig*, 4 Wash. (U. S. C. C.) 729; *Grannis v. Brandon*, 5 Day (Conn.), 260; *State v. Bailey*, 1 Penn. St. 415.

the court is bound by the statement on oath of the witness; and their language was cited with approbation in *Adams v. Lloyd*,<sup>1</sup> by Pollock, C. B., but with this qualification, that the judge must be perfectly certain that the witness is not trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege. The whole doctrine was, however, distinctly denied by Parke, B., in *Osborn v. The London Dock Company*,<sup>2</sup> and by Stuart, V. C., in *Sidebottom v. Adkins*,<sup>3</sup> the latter of which is an express decision on the subject, the others being only dicta unnecessary for the determination of the cases in which they are found. It was also gravely doubted by Willes, J., in *Ex parte Fernandez*.<sup>4</sup> In support of the exclusive right of the witness or party interrogated, it was urged that, as he alone can know in what way the answer to any particular question could affect him, the requiring him to explain this to the court would be a virtual denial of the privilege; seeing that it is impossible to affirm à priori that any imaginable fact can

[ \* 177 ] \*under no possible circumstances whatever become evidentiary, either immediately or mediately, of any other. That as, when a witness called on to produce documents under a subpoena duces tecum, swears that they are his muniments of title, the court always excuses him from producing them,<sup>5</sup> a similar rule ought to prevail when under an ordinary subpoena a witness is asked questions, the answers to which may be equally or even more injurious to him. On the other

<sup>1</sup> 3 H. & N. 361, 362; 27 L. J., N. S., Exch. 499; 4 Jur., N. S. 590.

<sup>2</sup> 10 Exch. 701; 1 Jur., N. S. 93.

<sup>3</sup> 3 Jur., N. S. 631, 632.

<sup>4</sup> 10 C. B., N. S. 3, 39.

<sup>5</sup> Tayl. Ev. §§ 428, 1318, 4th Ed.



hand, however, it is to be remembered that the judge is the proper authority to determine all questions relative to the reception of testimony; and consequently to decide whether, taking into consideration all the circumstances, including the demeanor of the person who claims the privilege, an answer to any particular question ought to be exacted:’ and that the allowing the witness or party interrogated the exclusive right contended for, would not only introduce an anomaly into the law of evidence, but enable every witness, who might be swayed by improper motives, and indifferent to his reputation, easily, and with perfect impunity, to evade giving any evidence whatever. The position that a witness, or party interrogated, ought not to be compelled to show in what precise way a question might injure him, however sound in itself, falls far short of establishing that he is the exclusive judge, not only as to the existence of the facts which might expose him to injury, but also as to the effect of those facts in point of law. Besides, it is a mistake to suppose that every unfounded objection raised by a witness to a question must necessarily have its foundation in *mala fides*; it may be the result of idle terror or scruples, to give effect to which would be a violation of the well-known principle of law, that the fear which excuses an act must not be a vain fear, but a reasonable one, “*Qui cadere potest in virum constantem.*”<sup>2</sup> \*The rule that a witness will not be compelled to produce documents which he [ \* 178 ] swears are his muniments of title, is in a great degree the offspring of necessity; being based on the immediate and irreparable mischief which would issue from an erroneous

<sup>1</sup> *The People v. Mather*, 4 Wend. 229, 254.

<sup>2</sup> Co. Litt. 253 b; Lofft’s Max. 440. See, also, Dig. lib. 50, tit. 17, l. 184.

decision of the judge as to the nature of the documents. Still we apprehend, that if it could be clearly shown that the statement of the witness as to their character was untrue, the judge would compel their production.

§ 128.\* The whole question came at last before the Queen's Bench in *Reg. v. Boyes*,<sup>1</sup> where the dicta in *Fisher v. Ronalds* were distinctly overruled by an unanimous decision of that court. That was an information filed by the Attorney-General in pursuance of a resolution of the House of Commons, for bribery at an election for members to serve in parliament; and at the trial, Martin, B., held that a witness who had been pardoned for his share in the transaction was bound to answer questions concerning it. On this ruling being questioned before the Court in Banc, consisting of Cockburn, C. J., Wightman, Crompton and Blackburn, JJ., it was argued that the witness was in jeopardy by being compelled to answer; for although the Crown could pardon offenses as regards itself, the witness was still liable to an impeachment by the House of Commons, against which, by 12 & 13 Will. 3, c. 2, s. 3, no pardon of the Crown could be pleaded. The case was argued, and *Fisher v. Ronalds* and some other authorities were referred to. After time taken to consider, the following judgment was delivered by Cockburn, C. J., in the name of himself and the other members of the court. "It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay, further, that the witness was the sole

[ \* 179 ] \* judge as to whether his evidence would bring him into danger of the law: and that the statement of his belief to that effect, if not manifestly made

<sup>1</sup> 1 B. & S. 311.

malâ fide, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by Lord Wensleydale, in *Osborn v. The London Dock Company*,<sup>1</sup> and acted upon by Vice-Chancellor Stuart, in *Sidebottom v. Adkins*, is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: there being no doubt, as observed by Alderson, B., in *Osborn v. The London Dock Company*,<sup>2</sup> that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril. Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things — not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of

<sup>1</sup> 10 Exch. 698, 701.

<sup>2</sup> 2 Jur., N. S. 631.

[ \* 180 ] the \*law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding in the unhappily too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of. To suppose that such a proceeding would be applied to in the case of this witness would be simply ridiculous; more especially as the proceeding by information was undertaken by the Attorney-General by the direction of the House itself, and it would therefore be contrary to all justice to treat the pardon provided, in the interest of the prosecution, to insure the evidence of the witness, as a nullity, and to subject him to a proceeding by impeachment. It appears to us, therefore, that the witness in this case was not, in a rational point of view, in any the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings; and that it was therefore the duty of the presiding judge to compel him to answer." (a)

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(a) In *Hunt v. McCalla*, 20 Iowa, 20, the court decided that the witness must testify, as in its judgment his answers would not criminate him; *State v. Marshall*, 36 Mo. 400; *Pinkard v. State*, 30 Ga. 757; *Poindexter v. Davis*, 6 Gratt.

§ 129. It used to be considered that the witness who intended to claim the privilege of not answering questions of this nature was bound to claim his privilege

(Va.) 481; *Short v. Mercier*, 1 Eng. Law & Eq. 208. In *Andrews v. Fry*, 104 Mass. 234, it was held that the refusal of the respondent to answer a question when testifying might be used against him in the case of an ordinary misdemeanor.

The rule would seem to be that in all cases where the evidence of the witness would, if repeated as an admission on his own trial, tend to prove him guilty, he is excused from answering, but the privilege is one that the witness cannot determine entirely for himself. (He must satisfy the court that the objection to making answer is well founded.) *People v. Kelly*, 24 N. Y. 74. But he cannot refuse to answer because his answer would assist in pointing out to the prosecuting officer sources of evidence to sustain a *criminal suit* against himself, of which, except for his evidence, the prosecution could have no knowledge. *Id.*

In Iowa it is held that the answers need not directly criminate the witness, but that, if the answers to questions which might be rightfully put would, if answered, form a link in a chain of evidence that would criminate him, he is not compelled to answer; and in this case the privilege was upheld upon the ground that the proper line of cross-examination of the witness would educe the crminating evidence. *Printz v. Cheeney*, 11 Iowa, 469. See, also, *People v. Mather*, 4 Wend. (N. Y.) 229.

The privilege must be asserted at the earliest opportunity. If the witness voluntarily gives evidence in chief, he cannot refuse to answer questions put to him on cross-examination, when the answers are necessary to explain his previous evidence, and he cannot refuse to answer even though his answers may criminate him. *People v. Carroll*, 3 Parker's Cr. Rep. (N. Y.) 73; *State v. Kyle*, 4 N. H. 462.

An accomplice who has been led to give evidence for the State on a promise, express or implied, of a pardon, cannot refuse to answer on the ground that his answers would criminate him. *Alderman v. People*, 4 Mich. 414. When a respondent puts himself upon the stand as a witness in his own behalf, he cannot claim any privilege except such as would be proper for any other witness, but must answer all proper questions put to him pertinent to the issue. *Brandon v. People*, 42 N. Y. 265; *State v. Ober*, 52 N. H. 459; *McGarry v. People*, 2 Lans. (N. Y.) 227.

The witness alone has a right to object to a question otherwise pertinent, but the answer to which might criminate him. *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621. The privilege is personal, and is in no sense the privilege of the party calling him; *Clark v. Reese*, 35 Cal. 89; but the court may caution a witness as to the effect of his evidence; *Fisher v. Ronalds*, 16 Eng. Law & Eq. 417; but will not instruct them beforehand, but will interfere for their protection. *U. S. v. Darrand*, 3 Wallace, Jr. (U. S.) 143, 179. See *Taylor v. Wood*, 2 Edwards's Ch. (N. Y.) 94.

at once; if he began a criminative statement when he  
 [ \* 181 ] \*might have refused to make it, he was com-  
 pellable to go on with it: a rule probably estab-

The privilege is not confined merely to a question, the answer to which might subject him to punishment, but he may also decline to answer when the answer would tend to make him infamous; *People v. Herrick*, 13 Johns. (N. Y.) 82; *U. S. v. Craig*, 4 Washb. (C. C. U. S.) 729; *Grannis v. Brandon*, 5 Day (Conn.), 260; *State v. Baily*, 1 Penn. 415. But see *Eaton v. Farmer*, 46 N. H. 200; or will tend to stigmatize or disgrace him; *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *Vaughn v. Paine*, 2 Penn. 728; or when it will accuse him of an immoral act; *Galbraith v. Eichelbergher*, 3 Yeates, 515; or will inevitably criminate him. *Richman v. State*, 2 Greene (Iowa), 582; *Com. v. Howell*, 5 Gratt. (Va.) 664; *Byass v. Smith*, 4 Bosw. (N. Y.) 679.

The witness is excused from answering when his answer will tend to criminate him; *People v. Mather*, 4 Wend. (N. Y.) 229; and his refusal to answer is not to be allowed to operate injuriously to either party. *Phealing v. Kenderdine*, 20 Penn. St. 354; *Janvrin v. Scammon*, 9 Foster (N. H.), 200; *Coburn v. Odell*, 10 id. 540; *Pleasant v. State*, 15 Ark. 624; *Carne v. Litchfield*, 2 Mich. 340; *Short v. State*, 4 Harr. (Del.) 568; *Hale v. Caldwell*, 5 Gil. (Ill.) 33; *French v. Vinneman*, 14 Ind. 282. But this will not extend to simple misdemeanors punishable by fine; *Hays v. Richardson*, 1 G. & J. (Md.) 366; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Copp v. Upham*, 3 N. H. 159; *State v. Douglass*, 1 Miss. 527; *Ward v. State*, 2 id. 120; or a penalty; *Wilkins v. Malone*, 14 Ind. 153; *Gorham v. Carroll*, Litt. (Ky.) 221; *Henry v. Salina*, 1 N. Y. 83. But see *Lea v. Henderson*, 1 Cold. (Tenn.) 146.

But where the witness for any cause is exempt from punishment for the crime with which his evidence will tend to connect him, as when he has been pardoned, or when the statute of limitations has barred it, the privilege will not be allowed. *State v. Quarles*, 13 Ark. 307; *Clorn v. Olney*, 1 Den. (N. Y.) 319. But the party claiming the answer must show affirmatively that no indictment was found within six years. *Henry v. Bank of Salina*, 3 Den. (N. Y.) 593; *Weldon v. Burch*, 12 Ill. 374. A pardon does not, in some cases, deprive a witness of his privilege. *Maloney v. Dows*, 2 Hill (N. Y.), 247.

The witness need not answer when in his own judgment his answer would or might expose him to a criminal prosecution for a crime; *Lister v. Baker*, 6 Blackford (Ind.), 439; *People v. Rector*, 19 Wend. (N. Y.) 569; *Robinson v. Neal*, 5 Monroe (Ky.), 212; *Chamberlain v. Wilson*, 12 Vt. 491; *Poole v. Perritt*, Speers (S. C.), 128; but the court may compel an answer when it is evident the witness is mistaken, or when he is evidently acting in bad faith. *Winder v. Diffenderfer*, 2 Bland. (Va.) 166; *Chamberlain v. Wilson*, ante; *Com. v. Brainard*, Thacher's Cr. Cas. (Miss.) 146; but if the answer would or does tend to criminate him, it is error to compel an answer; *State v. Hopkins*, 23 Wis. 309; and the court should always decide upon the validity of the privilege. *Janvrin v. Scammon*, 9 Foster (N. H.), 280.

lished with the view of preventing witnesses from converting the privilege given by law for their own protection, into a means of serving one of the litigant parties,

The witness, under the instruction of the court, and upon his oath, must say whether his answer will tend to criminate him, and his decision is conclusive, unless there are facts that excuse the crime. If the witness falsely claims the privilege he is liable for perjury; *Kirschner v. State*, 9 Wis. 140; *Poole v. Perritt*, ante; he is also liable to an action in favor of the party injured if his answer is false and his refusal willful. *Warner v. Lucas*, 10 Ohio, 336. But the privilege must be claimed at the earliest opportunity, or it is waived. If he begins to testify he must submit to a full cross-examination, if required. *Com. v. Price*, 10 Gray (Mass.), 472; *Foster v. Pierce*, 11 Cush. (Mass.) 487; *Chamberlain v. Wilson*, ante; *Foster v. People*, 18 Mich. 266; *State v. Foster*, 3 Fost. (N. H.) 348. But see, contra, *Pitcher v. People*, 16 Mich. 142.

In an action for libel a witness is not compelled to answer whether he wrote the libelous article. *Simmons v. Holster*, 13 Minn. 240. It is for the witness to claim his privilege, and the court must say whether his answer will tend to criminate him. *State v. Duffy*, 15 Iowa, 425; *Janvrin v. Scammon*, 9 Foster (N. H.), 280.

The rule would seem to be that if the question is such that if any affirmative or negative answer was given thereto it might tend to connect the witness with the crime, or with any crime, he is excused from answering. As to whether such would be the legal effect, is a question for the court. If the court decides incorrectly it is error, and an exception lies. *Floyd v. The State*, 7 Tex. 215.

That there may be no misapprehension as to the rule or its effect, it should be stated that, while a witness is privileged from answering any questions that will criminate, or tend even to criminate him, yet this privilege must be asserted before he has testified to any matter covered thereby. If he testifies in part to matters covered by the privilege, without asserting it, he will be compelled to answer all questions put to him on cross-examination, whether the answers will tend to criminate him or not. But his previous testimony must have been given in answer to inquiries, against which his privilege might have been asserted, or his privilege is not waived. He is simply required to claim it the first opportunity, and this cannot be done until questions are put calling for a class of answers that are within the privilege. *Com. v. Howe*, 13 Gray (Mass.), 26; *Foster v. Pierce*, 11 Cush. (Mass.) 487.

A witness should not be compelled to answer unless the effect of the evidence is entirely free from doubt. *Fellows v. Wilson*, 31 Barb. (N. Y.) 162. A witness may criminate himself if he chooses to; neither party can object to his doing so. *Newcomb v. State*, 37 Miss. 383; *Com. v. Shaw*, 4 Cush. (Mass.) 594; *Norfolk v. Gaylord*, 28 Conn. 309.

The peril to the witness from answering a question must be immediate, real and appreciable, rather than remote, contingent or possible. The court must be able to see from the circumstances of the case that the witness has a

by setting up the privilege when their evidence began to tell against him. But in *R. v. Garbett*<sup>1</sup> a majority of the judges overruled the old notion, and held that the witness might claim his protection at any stage of the inquiry.

*Questions tending to disgrace.*

§ 130. Whether a witness is compellable to answer questions having a tendency to *disgrace* him; as for instance, whether he was ever convicted of an offense, or had suffered some infamous punishment, or been in jail on a criminal charge, is a great question in our books, and one on which any attempt to reconcile the authorities would be perfectly hopeless. It is indeed settled that he must answer if the question is relevant to the issue in the cause:<sup>2</sup> (a) the doubt is when it relates to collateral

<sup>1</sup> 1 Den. C. C. 236; 2 Car. & K. 495.

<sup>2</sup> 2 Phill. Ev. 494, 10th Ed.; Ph. & Am. Ev. 916, 917.

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reasonable ground of apprehension that, if compelled to answer, his evidence would at least *tend* to expose him to prosecution. Some of the cases seem to regard the witness himself as the sole judge of the effect of his answers, but this is not the general rule, nor, indeed, is it a rule that commends itself to favorable adoption. Largely, of course, the matter must rest with the witness and in his judgment, but the court is really to determine upon the validity of his objection from the question and all the circumstances of the case. If the privilege is claimed *mala fide*, or if the danger to the witness is remote and possible, rather than direct and probable, or if there exists any thing which prevents the apprehended effect of the evidence, as a pardon for the particular offense, or the statutory bar of limitations, the court not only may, but should, compel an answer. *Chamberlain v. Wilson*, 12 Vt. 491; *Winder v. Diffenderffer*, 2 Bland. (Va.) 166; *Regina v. Boyes*, 1 Ellis, 311.

In reference to questions tending to disgrace, the court has a wide discretion, but not so as to those that criminate. *State v. Belowsky*, 3 Minn. 246.

(a) In this country the rule is generally otherwise. *Fries v. Bruzler*, 7 Halst. (N. J.) 79; *Southard v. Rexford*, 6 Cow. (N. Y.) *Vaughan v. Paine*, 2 Penn. 728; *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *Galbraith v. Eichelberger*, 3 Yeates (Penn.), 575.

But where his answer will merely affect his pecuniary interests the privilege does not apply. *Hays v. Richardson*, 1 G. & J. (Md.) 386; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Com. v. Thurston*, 7 J. J. Marsh. (Ky.) 62; *Tancey v. Kemp*, 4



matters, and is only put in order to test his credit. The arguments pro and con are thus stated in a work of authority:<sup>1</sup> "There seems to be no reported case, in which

<sup>1</sup> 2 Phill. Ev. 494, 10th Ed.

H. & J. (Md.) 348; *Naylor v. Semmes*, 4 G. & J. (Md.) 273; *Copp v. Upham*, 3 N. H. 159; *Gorham v. Carroll*, 3 Litt. (Ky.) 221; *Black v. Coorgh*, id. 226; *Ward v. Sharp*, 12 Vt. 115; *Matter of Kip*, 1 Paige's Ch. (N. Y.) 601; *Stewart v. Turner*, 3 Edwards' Ch. (N. Y.) 458; *Harper v. Burrow*, 6 Ired. (N. C.) 30. Where an answer will make the witness infamous he need not answer; *Lohman v. People*, 8 Barb. (N. Y.) 216; *U. S. v. Dickerson*, 2 McLean (U. S.), 325; or degrade his moral character; *People v. Rector*, 19 Wend. (N. Y.) 569; or tend to stigmatize or disgrace him. *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *Vaughn v. Paine*. But see *Rutherford v. Com.*, 2 Metc. (Ky.) 387; or to charge him with an immoral act. *Galbraith v. Eichelberger*, 3 Yeates, 515; but the privilege is limited to questions bearing upon immaterial issues. It does not exist where the answer goes to the very fact in issue; *Lohman v. People*, 1 N. Y. 379; *In re Lewis*, 39 How. (N. Y.) 155; *Taylor v. Jennings*, 7 Robertson (Superior Ct. N. Y.), 581; *Clark v. Reese*, 35 Cal. 85; *Clementine v. State*, 14 Miss. 112; *Ex parte Rowe*, 7 Cal. 184; as in a bastardy case if the defendant testifies, he may be compelled to answer whether he ever had sexual intercourse with the woman; *Ford v. State*, 29 Ind. 541; or in an action for enticing away and debauching the plaintiff's wife, when the answer, among other things, alleged that the wife was compelled to leave in consequence of the plaintiff's immorality, and the introduction of a lewd woman into his house, and kept there for sexual intercourse, it was held that, on an examination of the plaintiff, as a witness for the defendant, before the trial, he was bound to answer in reference to the matters set up in the answer. *Taylor v. Jennings*, ante.

A witness cannot be questioned on cross-examination whether he has not previously been convicted of a crime; *Tift v. Moor*, 59 Barb. (N. Y.) 619; but he may be asked whether he has not been in the penitentiary, State prison or any other place that would tend to impair his credibility; but such questions are largely in the discretion of the court, and it should be liberally exercised. *Real v. People*, 42 N. Y. 270. But this case is hardly up to the standard of the court giving it, as it contravenes the rule requiring the highest class of evidence, which, in such a case, would be the record of conviction. See *Clement v. Brooks*, 13 N. H. 92; *Kirschner v. State*, 9 Wis. 140; nor a woman whether she has not been twice married, and whether her last marriage was not before her first husband's death; *Forney v. Ferrell*, 4 W. Va. 729; nor whether he has not testified falsely; *State v. Blake*, 25 Me. 350; nor, in New York, whether he has not taken usurious interest. *Bank of Salina v. Henry*, 2 Den. (N. Y.) 155; *Curtis v. Knox*, id. 341. But contra see *Southworth v. Bennett*, 58 N. Y. 659, where it was held that the allowance or rejection of such evidence is in the discretion of the court. This case seems to be in conflict with *Newcomb v. Griswold*, 21 N. Y. 298, and *Jackson v. Osborn*, 2 Wend. (N.

this point has been solemnly determined; and, in the absence of all express authority, opinions have been much divided. The advocates for a compulsory power in cross-examination might argue, that as parties are frequently surprised by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary: and that if a witness may not be questioned as to his character at the [ \* 182 ] moment of trial, the property and \*even the life of a party must often be endangered. Those, on the other side, who maintain that a witness is not compellable to answer such questions, may contend to the following effect. They say, the obligation to give evidence arises from the oath, which every witness takes; that by this oath he binds himself only to speak touching the matters in issue; and that such particular facts as these — whether the witness has been in jail for felony or suffered some infamous punishment, or the like, — cannot form any part of the issue, as appears evident from this consideration, that the party, against whom the witness is called, would not be allowed to prove such particular facts by other witnesses. They may argue, further, that it would be an extreme grievance to a witness, to be compelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character

Y.) 555, as well as the cases cited from 2nd Denio; but however that may be it comports with the general tenor of the late cases, that when the punishment is simply by fine or forfeiture the court may, in its discretion, compel an answer; and the policy of this rule is not doubtful. An unmarried woman need not answer whether she has any children; *Campbell v. State*, 23 Ala. 44; nor whether she is not unchaste, or reputed to be so. *Howell v. Com.*, 5 Gratt. (Va.) 664; *Forney v. Ferrell*, 4 W. Va. 729.

afresh to evil report and obloquy, when perhaps by subsequent conduct he may have recovered the good opinion of the world; that if a witness is privileged from answering a question, though relevant to the matters in issue, because it may tend to subject him to forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question to the disparagement and forfeiture of his character; that in the case of accomplices, in which this compulsory power of cross-examination is thought to be more particularly necessary, the power may be properly conceded to a certain extent, because accomplices stand in a peculiar situation, being admitted to give evidence only under the implied condition of making a full and true confession of the whole truth; but even accomplices are not to be questioned, in their cross-examination, as to other offenses in which they have not been concerned with the prisoner: lastly, that with respect to witnesses, in general, the best course to be adopted, both in point of convenience and justice, is to allow the question to be asked, at the same time \*allowing the witness to shelter himself under his privilege of refusing to answer, and, if he [ \* 183 ] refuses, to leave it to the jury to draw their own conclusion as to his motives for such refusal. Although there appears not to be any express decision on the point, whether a witness is compellable to answer questions degrading to his character, yet several opinions have been pronounced by judges of great authority, from which it may be collected that the witness is not compellable to answer such questions." In support of this view the following authorities are then cited: *Cook's case*,<sup>1</sup> *Sir J. Friend's case*,<sup>2</sup> *Lawyer's case*,<sup>3</sup> *R. v. Lewis*,<sup>4</sup> *Macbride v.*

<sup>1</sup> 13 Ho. St. Tr. 334.<sup>2</sup> Id. 16, 17.<sup>3</sup> 16 Id. 161.<sup>4</sup> 4 Esp. 225.

*Macbride*,<sup>1</sup> and *R. v. O'Coigly, O'Connor and others*.<sup>2</sup> The first three of these are taken from the State Trials, the latest of which was decided in 1722; and the second is only a dictum, for the point was whether a witness was bound to say he was a Roman Catholic, the answering which in the affirmative would in those days have exposed him to a *penalty*.<sup>3</sup> The fourth and fifth prove too much, for in them the judges ruled that questions such as we are now considering could not be *put*,—a position clearly erroneous;<sup>4</sup> and in the sixth it is not easy to collect on what precise ground the decision of the court proceeded, as they do not assign any reasons for it. To these are commonly added *Dodd v. Norris*,<sup>5</sup> *R. v. Hodgson*,<sup>6</sup> and *Millman v. Tucker*;<sup>7</sup> but in the first two the question involved a charge of fornication, and as such the answer might have rendered the party liable to be proceeded against in the Ecclesiastical Court. The same view is [ \* 184 ] \*also supported by the old cases, in the State Trials, of *Reading*<sup>8</sup> and the *Earl of Shaftesbury*.<sup>9</sup> On the other hand, however, there are several modern authorities expressly in point the other way, viz.: *R. v. Edwards*,<sup>10</sup> *Frost v. Holloway*,<sup>11</sup> and *Cundell v. Pratt*,<sup>12</sup> to which may be added *Roberts v. Allatt*;<sup>13</sup> and the same is

<sup>1</sup> Id. 242.

<sup>2</sup> 26 Ho. St. Tr. 1353.

<sup>3</sup> See *R. v. Lord George Gordon*, 2 Dougl. 593.

<sup>4</sup> Ph. & Am. Ev. 920 *et seq.*; 2 Phill. Ev. 497 *et seq.*, 10th Ed.; Stark. Ev. 218, 4th Ed.; Ros. Crim. Ev. 166, 4th Ed.

<sup>5</sup> 3 Camp. 519.

<sup>6</sup> R. & R. C. C. 211.

<sup>7</sup> Peake's Add. Ca. 222.

<sup>8</sup> 7 Ho. St. Tr. 296.

<sup>9</sup> 8 Id. 817.

<sup>10</sup> 4 T. R. 440.

<sup>11</sup> Ph. & Am. Ev. 922, note; 2 Phill. Ev. 500, 10th Ed.

<sup>12</sup> 1 M. & M. 108.

<sup>13</sup> Id. 192.

indirectly established by other cases, which show that if such questions are put the witness's answer must be taken, and that he cannot be contradicted by fresh evidence.<sup>1</sup> We apprehend that *in strictness* the courts can compel a witness to answer under such circumstances, but that in the exercise of their discretion they will not do so, unless the ends of justice clearly require it; which however seldom happens, as in general the object of the cross-examining party is sufficiently attained by *putting* the question; for the silence of a person, to whom in his hearing a crime or disgraceful act is imputed, is in many instances tantamount to confession. "No doubt," says a modern work on Evidence,<sup>2</sup> "cases may arise where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them \*would not be a man of veracity, might very fairly be checked. [ \* 185 ] But the rule of protection should not be further extended; for, if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him.

<sup>1</sup> Ph. & Am. Ev. 923; 2 Ph. Ev. 501, 10th Ed.

<sup>2</sup> Tayl. Ev. §§ 1314, 1315, 5th Ed.

It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause."

By the 17 & 18 Vict. c. 125, sects. 25, 103, a witness in a civil case may be questioned as to whether he has been *convicted* of any felony or misdemeanor, and if he either denies the fact or refuses to answer, the opposite party may prove the conviction. And by 28 Vict. c. 18, s. 6, which applies "to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence,"<sup>1</sup> a witness may be questioned as to whether he has been *convicted* of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction.

*Questions tending to subject to civil proceedings.*

§ 131. It was formerly a disputed point whether witnesses were compellable to answer questions the answers to which would subject them to *civil* proceedings.<sup>2</sup>

[ \* 186 ] \*To set this matter at rest the 46 Geo. 3, c. 37, was passed, which, after reciting the existing doubts on the subject, proceeded to *declare* and enact, that

<sup>1</sup> Sect. 1.

<sup>2</sup> 2 Phill. Ev. 492, 493, 10th Ed.; Stark. Ev. 203, 204, 4th Ed.

"a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever,<sup>1</sup> by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit." (a)

<sup>1</sup> As to the nature and extent of the forfeiture spoken of, see *Pye v. Butterfield*, 5 B. & S. 829, and the cases there referred to.

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(a) In this country it is held, without the aid of statutes, that the fact that the answer to a question will involve a witness in pecuniary loss, will not excuse him from answering. *Gorham v. Carroll*, Litt. (Ky.) 221; *Hays v. Richardson*, 1 G. & J. (Md.) 366; *Capp v. Upham*, 3 N. H. 159; *Ward v. State*, 2 Wis. 120; *Bull v. Loveland*, 10 Pick. (Mass.) 19; *State v. Douglass*, 1 Wis. 527; *Taucey v. Kemp*, 4 H. & J. (Md.) 348; *Stewart v. Turner*, 3 Edwards' Ch. (N. Y.) 458; *Harper v. Burrows*, 6 Ired. (N. C.) 30; *Matter of Kipp*, 1 Paige's Ch. (N. Y.) 601.

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## \* CHAPTER II.

## INCOMPETENCY OF WITNESSES.

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*Presumption in favor of human testimony — Distinction between the competency and credibility of witnesses — Incompetency.*

§ 132. As the reception of and credit attached to the statements of witnesses by courts of justice rest on the natural, if not instinctive, belief which is found to exist in the human mind,<sup>1</sup> in the *general* veracity of human testimony, especially when guarded by the sanction of an oath, it follows that all testimony delivered under that sanction, and perhaps even without it, ought to be heard and believed until special reason appears for doubt or disbelief. And here arises a leading distinction which runs through the judicial evidence of this and most other countries; namely, that in some instances the special reason is so obvious that the law deems it safer to reject the testimony of the witness altogether, while in others it allows the witness to make his statement, leaving its truth to be estimated by the tribunal.<sup>2</sup> This is the distinction taken in our books

<sup>1</sup> Introd. pt. 1, § 15.

<sup>2</sup> "Summa distinctio et observatio est, testes aut prohiberi penitus, aut reprobari duntaxat. Prohibentur, qui planè non audiuntur; Reprobantur,

[ \* 189 ] \*between the *competency* and the *credibility* of witnesses. A witness is said to be *incompetent* to give evidence when the judge is bound as matter of law to reject his testimony, either generally or on some particular subject; in all other cases it is to be received and its credibility weighed by the jury. The present chapter will be confined to the *incompetency* of witnesses.

*Incompetency not presumed—How ascertained.*

§ 133. Incompetency in a witness will not be presumed. It comes in the shape of an exception or objection to the witness; and if the facts on which it rests are disputed they must, like all other collateral questions of fact,<sup>1</sup> be determined by the judge;<sup>2</sup> who, in case of doubt, is always disposed to receive the witness, and let the objection go to his credibility rather than to his competency. In many cases the ground of incompetency is apparent to the senses of the judge; as where a witness presents himself in a state of intoxication,<sup>3</sup> or is an obvious lunatic,<sup>4</sup> or of such tender years that the judge deems a preliminary inquiry into his religious knowledge essential,<sup>5</sup> and the like. But the ordinary mode of ascertaining whether a witness is competent is by examining him on what is called the *voir dire*, *i. e.*, a sort of preliminary examination by the judge, in which the witness is required to speak the truth with respect to the questions put to him; when, if incompetency appears from his answers, he

quibus auditis aliquid obijci potest, quo minus fidem mereantur." Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 1. See 1 Hale, P. C. 635; 2 Id. 276-7.

<sup>1</sup> Bk. 1, pt. 1, § 82.

<sup>2</sup> *Bartlett v. Smith*, 11 M. & W. 483; *R. v. Hill*, 2 Den. C. C. 254.

<sup>3</sup> See the judgment in *Mansell v. Reg.*, 1 Dears. & B. 405. "Ebrietas probatur ex aspectu illius qui asseritur ebrius, &c." Masc. de Prob. Concl. 579, nn. 5 et seq.

<sup>4</sup> *Infrà*.

<sup>5</sup> *Infrà*.

is rejected,<sup>1</sup> and even if they are satisfactory the judge \*may receive evidence to contradict them or establish other facts showing the witness to be [\* 190] incompetent.<sup>2</sup> It sometimes happens that the incompetency of a witness is not discovered until after he has been sworn, and his examination proceeded with a considerable way, or perhaps even brought to a close; under which circumstances the judge ought, it seems, to erase that witness's evidence from his notes, and tell the jury to pay no attention to it.<sup>3</sup> It has been said, also, that although in regular order the examination on the voir dire precedes the examination in chief; yet, when a ground of incompetency is thus unexpectedly discovered, the judge may stop the proceedings, and examine on the voir dire with the view of ascertaining the fact.<sup>4</sup>

*Grounds on which witnesses may be rejected unheard—  
Abuses of the principle of incompetency.*

§ 134. The only grounds on which the evidence of a witness can with any appearance of reason be rejected, *unheard*, are reducible to four. 1. That he has not that degree of intellect which would enable him to give a rational account of the matters in question.(a) 2. That

<sup>1</sup> *Yardley v. Arnold*, 10 M. & W. 141; *Jacobs v. Layborn*, 11 M. & W. 685; *Doe d. Norton v. Webster*, 12 A. & E. 442.

<sup>2</sup> *Bartlett v. Smith*, 11 M. & W. 483; *Cleave v. Jones*, 7 Exch. 421.

<sup>3</sup> See *Jacobs v. Layborn*, 11 M. & W. 685; and the authorities there cited; *R. v. Whitehead*, L. R., 1 C. C. 35; 1 Cox, C. C. 234.

<sup>4</sup> Per Rolfe, B., in *Jacobs v. Layborn*, *ut supra*. See also the resolution of the judges in the *Queen's case*, 2 B. & B. 284.

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(a) Under this head are embraced children, idiots and insane persons. The real test of mental capacity to testify as a witness is predicated upon the ability of the person to remember facts and detail them intelligently upon the stand, coupled with a sense of moral and legal responsibility to speak the truth upon oath. If, however, a person is otherwise competent as a witness, the fact that he does not believe in future punishment will not disqualify

he cannot or will not guarantee the truth of his statements by the sanction of an oath, or what the law deems its equivalent. 3. That he has been guilty of some

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him as a witness, but may be shown as affecting his credit. *State v. Scanlan*, 58 Mo. 204; *Cubbison v. McCreery*, 2 W. & S. 262; *Blecker v. Bremers*, 2 Ala. 354; *Brock v. Milligan*, 10 Ohio, 121; *Hoyt v. Adees*, 3 Lans. (N. Y. S. C.) 173; *Anderson v. Mayberry*, 2 Heisk. (Tenn.) 653. Children are admitted to testify irrespective of their age, if they are of sufficient mental capacity, and understand, or can be made to understand, the obligations imposed upon them by an oath. It is the right of a party to object to the evidence of a child, upon the grounds both of mental capacity and a lack of knowledge of the responsibilities, legal and moral, that an oath imposes; and when an objection is made, it is the duty of the court to ascertain the competency of the witness in both respects. If the child is able to talk correctly, and shows a degree of memory and mental power sufficient to detail the transaction to which its attention is called, the court will always admit the evidence, giving the witness full instruction as to the consequences of telling an untruth while under oath. No exact test, or standard of mental capacity applicable to all cases, can be given, but, as all children under the age of fourteen years are excluded from the benefit of the presumption that they are competent, that attaches in favor of those of and over that age, the courts in each case will be governed by the degree of intelligence exhibited by the witness in determining the question of admissibility. This is the course that has always been adopted by courts, and it is the right of a party to have the intelligence of the witness thoroughly tested, and it is error to admit it unless a proper degree of intelligence is shown. *State v. Dennis*, 19 La. Ann. 119; *Com. v. Carey*, 2 Brewst. (Penn.) 404; *Flanagan v. State*, 25 Ark. 92; *Warner v. State*, id. 447. See Hale's Pleas of the Crown, vol. 2, p. 238; *Kilburn v. Mullin*, 22 Iowa, 498; *Van Pelt v. Van Pelt*, 2 Penn. 657; *Washburn v. People*, 10 Mich. 372; *State v. Le Blanc*, 2 Const. (S. C.) 354; *Com. v. Hutchinson*, 10 Mass. 225; *People v. Bernal*, 10 Cal. 66.

This course was pursued by courts at an early day, and we have numerous instances of children of tender years being admitted as witnesses in criminal cases. Thus Hale says, vol. 1, p. 303, that "in some cases an infant of nine years of age has been allowed to give evidence. For," adds the writer, "though under the age of fourteen years, yet if he be *intelligent*, or the nature of the fact be such as to allow of the examination of one under that age, he may be examined on oath as a witness; as in the case of rape and buggery." And the learned author, from these premises, reasons that "one under the age of fourteen years may, if otherwise of a competent discretion, be a witness in a case of treason."

In *Young v. Seughterford*, 288, it was held that an infant of any age may be sworn as a witness, if he has sufficient capacity to be conscious of the danger of perjury. The consciousness of the obligation of an oath seems to have been regarded as the test of admissibility. The reason for this is apparent. It is presumed that a person who has sufficient intelligence to understand the

crime or misconduct, showing him to be a person on whose veracity reliance would most probably be misplaced. 4. That he has a personal interest in the

moral and legal obligations of an oath is also possessed of sufficient intelligence to tell what he knows about a transaction that he has witnessed.

In Buller's *Nisi Prius*, 293, that learned author lays down the rule thus: "In regard to children there seems to be no precise time fixed, wherein they are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, *as it shall appear, on examination, to the court,*" and he notes the instance of *Brazier's Case*, tried at the summer Assizes for York, April 12, 1778, in which the respondent was charged with committing a rape upon a child five years of age, and the question was raised as to the admissibility of the child as a witness, and he says, "it was agreed by all the judges, that a child of *any* age, if she were capable of distinguishing between good and evil, might be examined on oath, and, consequently, that evidence of *what she had said* ought not to be admitted."

No persons will be allowed to testify unless they take upon themselves the obligations of an oath, by some of the forms prescribed by law; and hence it is that no person, whether an infant or an adult, will be permitted to testify unless they are capable of understanding *the nature of an oath*, and the obligations, legal and moral, which it imposes. If, however, a person can be made to understand the obligations and nature of an oath, under instructions from the court, the fact that he or she did not possess the requisite knowledge when called to the stand will not prevent him from testifying, if the court is satisfied that he has been made to understand them before testifying. For the rule in such cases, as well as for the history of the growth of this branch of the law, see 1 McNally on Evidence, p. 151.

Idiots and persons of *non sane* mind are never permitted to testify. But, in reference to the latter class, the disability only exists during the period of insanity. If they have lucid intervals, during the period of *lucida intervalla*, if they have sufficient understanding, they may testify. The precise *minimum quod sit* which disables the party cannot be given, but must necessarily depend upon the circumstances of each case, and the court must feel assured that the witness has sufficient intelligence to comprehend the nature of an oath and the obligation it imposes. Leach's Cr. Cas. 507; Coke's Littleton, 66; 2 Hale's Pleas of the Crown, 278; 4 Blackst. Com. 24; 1 McNally's Evidence, 158.

But idiocy or insanity must be proved by evidence outside of the witness himself. The court may even refuse to allow the witness to be examined as to his competency. *Robinson v. Dana*, 16 Vt. 474. The fact that a witness is subject to fits of derangement is not sufficient to exclude his evidence, if he is sane at the time of giving his testimony. *Evans v. Hettich*, 7 Wheat. (U. S.) 453. Idiots, lunatics and madmen are not competent witnesses. *Livingston v. Hiersted*, 10 Johns. (N. Y.) 362; *Armstrong v. Timmons*, 3 Harr. (Del.) 342.

success or defeat of one of the litigant parties. In a word, his rejection should be based on the reasonable apprehension, arising from known circumstances, that his evidence may mislead the tribunal and so cause misdecision. But various classes of persons were re-  
 [ \* 191 ] jected \*by the civilians and our old lawyers on a very different ground, viz., that the giving evidence in a court of justice is a right or privilege rather than a duty, and consequently that incompetency to give evidence is a fitting punishment for matters to which the law is desirous of attaching a stigma. And although this is a fallacious and short-sighted view even when the offense

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The question as to the admissibility of *deaf and dumb* persons, particularly where they have been so from birth, is one which has been involved in much perplexity, but it is now well established that, if such persons are able to converse intelligibly by signs, and have a proper appreciation of the nature of an oath, their evidence may be received through the intervention of a sworn interpreter. This question was raised in the case of *The King v. Bartlett*, Leach's Cr. Cas., in 1786, in which the respondent was indicted for larceny; John Rushton, a deaf and dumb person, who had been so from birth, was offered as a witness. It was objected by the respondent that he was not a competent witness, but his sister being examined upon the *voir dire* testified that she and her brother had been able to converse with and understand each other for several years, through the medium of certain signs and motions which had been invented between them. These signs and motions were not significant of letters, syllables, words or sentences, but of general propositions and entire conceptions of the mind. She also testified that he had a thorough conception of the tenets of christianity, and she believed that she could make him fully understand the nature and responsibility of an oath. The court admitted the evidence, and the respondent was convicted. In such cases the witness must be able to express himself clearly, through the intervention of signs or motions, or must be able to express himself in writing—as it is generally the case, now that they are able to do so—and the court must be satisfied that he fully understands the nature of an oath and its obligations.

The rule in reference to the degree of capacity that a witness must possess is, that he must be fully possessed of such understanding as enables him to retain in memory the events to which their testimony is directed, and gives them a knowledge of right and wrong, therefore idiots and lunatics, when they are so far under the influence of the malady as to be deprived of such understanding are not regarded as competent. *Coleman's Case*, 25 Gratt. (Va.) 865.

stigmatised is a grave violation of natural or municipal law, the ancient practice went much farther, and affixed the brand of incompetency on erroneous or obnoxious opinions; thus, not only punishing the delinquent, but often inflicting ruin on the plaintiff, defendant, prosecutor, or accused person, whose life, property or honor might have been saved by the evidence of the rejected witness, whose doctrines he might nevertheless have held in due abhorrence. There can be no doubt that this mischievous principle was borrowed from the civil law, or, to speak more correctly, from those forms of it which prevailed in the lower empire and the middle ages.<sup>1</sup>(a) Most

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<sup>1</sup> See Bonnier, *Traité des Preuves*, §§ 185 *et seq.*

(a) In most of the States of this country witnesses are not excluded from giving evidence upon the ground of interest in the subject-matter of the action; but, even the parties themselves may testify in their own behalf. When, however, a witness is shown to be interested in the event of the suit, this may be considered, in connection with the weight to be given to his evidence. But neither the husband nor wife are allowed to give evidence for or against each other. Therefore upon the *voire dire* a female offered as a witness cannot be offered to disprove her marriage to either party, when her evidence is objected to upon the ground that she is the wife of either party, when there is sufficient evidence *aliunde* before the court to raise a presumption of marriage. *Rose v. Miles*, 1 Abb. Adm. (U. S.) 411.

But if a party objects to a witness against him on the ground that she is his wife, and she is admitted to testify, the error is cured by her answering, upon cross-examination, that she is not his wife. *People v. Anderson*, 26 Cal. 169. A person convicted of a felony cannot testify except where the statute has made provision therefor, but, when a full pardon has been granted, relieving him from all punishment imposed upon him at his conviction, the disability is removed, and he may be permitted to give his evidence. In such cases, the proper proof of the pardon is the production of that document under the seal of the State. *State v. Blaisdell*, 33 N. H. 388.

The fact that a witness is under indictment for a crime is not to be used in impeachment of him, nor does it affect his competency. *Lipe v. Eisenlerd*, 32 N. Y. 229.

A wife is not a competent witness against a trustee when the examination would lead her to testify in regard to matters in which her husband is interested. *Brown v. Burrington*, 36 Vt. 40. But when the action is brought against her and her husband jointly for her personal tort, she is competent to

of the provisions on the immediate subject are to be found in Cod. lib. 1, tit. 5; according to the 21st constitution of which, bearing date A. D. 532, heretics and Jews were not in general allowed to bear testimony against orthodox Christians. Where heretics or Jews were parties, the

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testify, *Hooper v. Hooper*, 43 Barb. (N. Y.) 292; but otherwise in Rhode Island. *Donnelly v. Smith*, 7 R. I. 12; *Briggs v. Titus*, 7 id. 441. Neither husband or wife is competent to give evidence for or against each other. *Moffat v. Moffat*, 10 Bosw. (N. Y.) 468; *Bird v. Davis*, 1 McCarter (N. J.), 467.

This rule is predicated not so much upon the ground of interest, as upon the ground of public policy; therefore statutes providing that *interest* in the subject-matter of the action shall not be regarded as disqualifying a person from giving evidence in an action, does not apply to husband and wife. *Bird v. Davis*, *ante*.

Thus it has been held that the declarations of a wife, that a child of which she was delivered was born alive, are not competent to be given in evidence to prove the husband's title to an estate by curtesy in the wife's lands. *Gardner v. Klatts*, 8 Jones (N. C.), 375.

In Vermont it is held, under a statute passed in 1858, that the wife may testify as to a transaction in which she acted as the agent of the husband, and of which he had no personal knowledge. *Estabrooks v. Prentice*, 34 Vt. 457. But this was held not to enable her to testify to accounts for her husband, kept by her from memoranda furnished by him. *Id.*

In Massachusetts it is held that the wife can only be a witness when she is a proper party to the action. *Barber v. Goddard*, 9 Gray (Mass.), 71; *Roy v. Smith*, *id.* 141. It is held that upon the trial of the husband upon a complaint for an assault upon the wife, she is a competent witness for him. *Com. v. Murphy*, 4 Allen (Mass.), 491.

In New York the wife is not a competent witness for the husband, except in an action to which she is a party. But when joined in an action with the husband, either as plaintiff or defendant, she may testify. *Schaffner v. Reuter*, 37 Barb. (N. Y.) 44; *White v. Stafford*, 38 id. 419. But when a party avails himself of the wife's evidence in an action, he cannot object to her giving further evidence in favor of her husband. *Tappan v. Butler*, 7 Bosw. (N. Y.) 480. Where other defendants are joined with the husband, the wife of one of them is not a competent witness for the others. *Tomlinson v. Lynch*, 32 Wis. 160. But see, *contra*, *Morrissey v. People*, 11 Mich. 327.

When the husband and wife are joined as parties the wife may testify. *Gee v. Lewis*, 20 Ind. 149; *Schaffner v. Reuter*, *ante*; *Palmer v. Henderson*, 20 Ind. 297.

In an action against the husband to enforce a lien upon the property of his deceased wife, he may testify to any matters except communication received from her relating to the property during her life. *Haugh v. Blythe*, 20 Ind. 24. See note 4, p.



evidence of heretics and Jews was receivable, the emperor observing, "concedimus dignos litigatoribus etiam testes introducere;" as it also was in certain other cases from necessity, "ne probationum facultas angustetur;" but the testimony of Pagans, Manichæans, and some other sects, was rejected under all circumstances.<sup>1</sup> Very similar rules were acted on by the canonists.<sup>2</sup> In former times in this country, when ecclesiastical dogmas were enforced by the secular \*arm, and the writ de hæretico comburendo was in force, the open profession [ \* 192 ] of infidelity was rare, and Jews had been expelled from the kingdom in the reign of Edw. I., so that very explicit information on this subject cannot be expected from our early lawyers. Sir Edward Coke, indeed, in his First Institute, lays down broadly that an infidel cannot be a witness,<sup>3</sup> but cites no authority. In *Calvin's case*<sup>4</sup> also he says, "All infidels are in law perpetui inimici, perpetual enemies (for the law presumes not that they will be converted, that being remota potentia, a remote possibility), for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace." For this the only authorities cited, besides one of those passages of Scripture which are commonly strained for similar purposes, are the 12 Hen. VIII. fol. 4 a, pl. 3, and the Regist. Brev. Orig. 282, b; the former of which is a mere dictum by Brook, J., that a pagan cannot maintain an action; and the latter is an extract from a writ relative to the Knights Hospitallers, in which their institution is described as founded "in

<sup>1</sup> See this constitution at length, Introd. pt. 2, § 63, n. (b).

<sup>2</sup> Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 19; Ayl. Par. Jur. Can. Angl. 448. Devot. Inst. Canon. lib. 3, tit. 9, § 13.

<sup>3</sup> Co. Litt. 6 b.

<sup>4</sup> 7 Co. 17.

tuitionem et defensionem universalis et sacrosanctæ ecclesiæ contra Christi et Christianorum inimicos." In another of his works also,<sup>1</sup> he tells us that the passage in Bracton where it is stated that an alien born cannot be a witness must be intended of an alien infidel. Whether Coke did not overstate the bigotry even of his own time may be questioned, but certain it is that within half a century after his death very different notions had arisen; and the whole subject will be best understood from the following powerful exposé of the fallacy of his views by L.C. J. Willes, in his judgment in *Omichund v. Barker*.<sup>2</sup> "As to the general question, Lord Coke has resolved it in the negative, Co. Litt. 6 b, that an infidel cannot be a witness; and it is [ \* 193 ] \*plain by this word "infidel" he meant Jews as well as heathens, that is, all who did not believe the Christian religion. In 2 Inst. 507, and many other places, he called the Jews *infidel Jews*; and in the 4 Inst. 155, and in several other passages of his books, he makes use of this expression, *infidel pagans*, which plainly shows that he comprised both Jews and heathens under the word infidels; and, therefore, Sergeant Hawkins (though a very learned, painstaking man) is plainly mistaken in his History of the Pleas of the Crown, vol. 2, p. 434, where he understands Lord Coke as not excluding the Jews from being witnesses, but only heathens. But Lord Chief Justice Hale understood this in another sense in that remarkable passage of his, which I shall mention more particularly by-and-by. I shall, therefore, take it for granted that Lord Coke made use of the word "infidels" here in the general sense; and that will, I think, greatly lessen the authority of what he says; because long before his time, and of late, almost ever since the

<sup>1</sup> 4 Inst. 279.<sup>2</sup> Willes, 541.

Jews have returned into England, they have been admitted to be sworn as witnesses. But, I think, the counsel for the defendant seemed to mistake the reason upon which Lord Coke went. For he certainly did not go upon this reason, that an infidel could not take a Christian oath, and that the form of the oath cannot be altered but by act of parliament; but upon this reason, though, I think, a much worse, that an infidel was not *fide dignus*, nor worthy of credit; for he puts them in company and upon the level with stigmatized and infamous persons. And that this was his meaning appears more plainly by what he says in *Calvin's case*. (The Lord Chief Justice here cites the passage already quoted.) But this notion, though advanced by so great a man, is, I think, contrary not only to the Scripture, but to common sense and common humanity. And I think that even the devils themselves, whose \*subject he says the heathens are, cannot [\* 194] have worse principles; and besides the irreligion of it, it is a most impolitic notion, and would at once destroy all that trade and commerce from which this nation reaps such great benefits. \* \* \* I have dwelt the longer upon this saying of his, because I think it is the only authority that can be met with to support this general assertion, that an infidel cannot be a witness. For, though it may be founded upon some general sayings in Bracton, Fleta and Britton, and other old books, those I think of very little weight, and therefore shall not repeat them; first, because they are only general dicta; and, in the next place, because these great authors lived in very bigoted popish times, when we carried on very little trade except the trade of religion, and consequently our notions were very narrow, and such as I hope will

<sup>1</sup> *Suprà*, p. 245.

never prevail again in this country. As to what is said by that great man, the Lord Chief Justice Fortescue, in his book *De Laudibus*, cap. 26, that witnesses are to be sworn on the holy evangelists, he is speaking only of the oath of a *Christian*, and plainly had not the present question at all in his contemplation. To this assertion of my Lord Coke's (besides what I have already said), I will oppose the practice of this kingdom before the Jews were expelled out of it by the stat. 18 Edw. 1. For it is plain both from Madox's *History of the Exchequer*, pp. 167 and 174, and from Selden, vol. ii. p. 1469,<sup>1</sup> that the Jews here in the time of King John and Henry III. were both admitted to be witnesses, and likewise to be upon juries in causes between Christians and Jews, and that they were sworn upon their own books, or their own roll, which is the same thing.<sup>2</sup> I will likewise oppose the constant practice here almost ever since the Jews have been

[ \* 195 ] \*permitted to come back again into England ; viz., from the 19. Car. II. (when the cause was tried which is reported, 2 Keb. 314), down to the present times, during which I believe not one instance can be cited in which a Jew was refused to be a witness and to be sworn on the Pentateuch. To this assertion I shall likewise oppose the very great authority of Lord Hale, vol. 2, p. 279. \* \* \* 'It is said by my Lord Coke that an infidel is not to be admitted as a witness, the consequence whereof would also be, that a Jew (who only owns the Old Testament) could not be a witness. But I take it, that although the regular oath, as it is allowed

<sup>1</sup> Selden's Works by Wilkins, in six volumes, A. D. 1726.

<sup>2</sup> See in further illustration of this the case of *Cok. Hagin*, Memoranda in Scacc. M. 3 Edw. I., and that in the 9th Edw. I., as cited Dyer, 144 a, pl. 59, in marg.

by the laws of England, is *tactis sacrosanctis Dei evangelis*, which supposeth a man to be Christian, yet in cases of necessity, as in foreign contracts between merchant and merchant, which are many times transacted by Jewish brokers, the testimony of a Jew, *tacto libro legis Mosaicæ*, is not to be rejected, and is used, as I have been informed, among all nations. Yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, especially *si juraverint per verum Deum creatorem*, and special laws are instituted in Spain touching the form of the oaths of infidels. Vide Covarruviam, Tom. 1. Part. 1. de formâ juramenti.' And he mentions a case where it would be very hard if such an oath should not be taken by a Turk or Jew,' which he holds binding; for possibly he might think himself under no obligation if he were sworn according to the usual style of the courts of England. 'But then it must be agreed, that the credit of such testimony must be left to the jury.' \* \* \* The last answer that I shall give to this assertion of Lord Coke's, as explained in *Calvin's case*, are his own words in his 4 Inst. 155. '*Ædus pacis* or *commercii*' (saith he), \* 'though not *mutui auxilii*, may be stricken between a Christian prince and an infidel pagan; and [ \* 196 ] as these leagues are to be established by oath, a question will arise whether the infidel or pagan prince may swear in this case by false gods, since he thereby offendeth the true God by giving worship to false gods. This doubt,' (saith he) 'was moved by Publicola to Saint Augustine, who thus resolveth the same; He that taketh the credit of him who sweareth by false gods, not to any evil but

<sup>1</sup> *I. e.* If a murder committed in England in presence only of a Turk or a Jew should be punishable because he could not take an oath which would be binding on his conscience.

good, he doth not join himself to that sin of swearing by devils, but is partaker with those lawful leagues wherein the other keepeth his faith and oath; but if a Christian should any ways induce another to swear by them, he would grievously sin. But seeing that such deeds are warranted by the word of God, all incidents thereto are permitted.' This is (I think) as inconsistent as possible with his notion that an infidel is not *fide dignus*, and a full answer to what he said in *Calvin's case* on this head; and, therefore, I shall leave him here, having (as I think) quite destroyed the authority of his general rule, that none but a Christian ought to be admitted as a witness."

§ 135. But although these rational and enlightened views had gained considerable ground during the seventeenth and early part of the eighteenth centuries,<sup>1</sup> they cannot be said to have been *established* until the great case of *Omychund* (or *Omichund*) v. *Barker*,<sup>2</sup> in 1744-5, when the whole matter was fairly brought before a high tribunal, whose deliberate decision forms [ \* 197 ] \* the basis of our law on this subject. In that case a commission to examine witnesses in the East Indies having been issued by the Court of Chancery, the commissioners certified that they had examined several persons professing the Gentoo religion, whose evidence was delivered on oath taken in the usual and most solemn form in which oaths were most usually adminis-

<sup>1</sup> In the case of *Fachina v. Sabine*, at the Council, 2 Str. 1104, Dec. 1731, a Moor was sworn on the Koran; and so far back as Mich. 1657, a witness, who objected to lay his hand on the book and kiss it, was allowed to swear, it being laid open before him and he holding up his right hand. *Colt v. Dutton*, 2 Sid. 6.

<sup>2</sup> 1 Atk. 21. There is a very short note of it in 1 Wils. 84; and the judgment of Willes, C. J., is given at length in his reports, p. 538.

tered to witnesses who profess that religion, and in the same manner in which oaths were usually administered to such witnesses in the courts of justice erected at Calcutta by letters patent. On account of its importance, Lord Chancellor Hardwicke was assisted at the hearing of the cause by Lee, C. J., Willes, C. J., and Parker, C. B.; when on its being proposed to read as evidence the deposition of one of those persons, the defendants' counsel objected that, in order to render a person a competent witness, he must be sworn in the usual way upon the evangelists, and that the law of England recognized no other form of oath. The case having been learnedly argued on both sides, and the authorities fully gone into, each of the judges delivered an able and elaborate judgment; in which they showed clearly that oaths are not peculiar to the Christian religion, having been in constant use, not only in the ancient world, but among men in every age; that the substance of an oath is essentially the same in all cases; namely, an invocation of a Superior Power to attest the veracity of a statement made by a party, acknowledging his readiness to avenge falsehood, and in some cases invoking that vengeance; consequently that the mode of swearing is not the material part of the oath, and ought to be adjusted to suit the conscience of the witness. They, however, agreed that infidels who do not believe a God or a state of rewards and punishments cannot be admitted as witnesses: and although from some of the language in that case, and in other books, it might be supposed that a belief on the part of the witness in a \* *future* state of reward and punishment is required, the better opinion is, that belief in an [ \* 198 ] Avenger of Falsehood generally is the only thing need-

ful, the time and place of punishment being mere matter of circumstance.<sup>1</sup>

§ 136. The principles laid down in *Omychund v. Barker* have not only been fully adopted into our law and practice,<sup>2</sup> but appear to be recognized by the stat. 1 & 2 Vict. c. 105; which enacts, that "in all cases in which an oath may lawfully be and shall have been administered to any person, either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of willful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

*Rules of incompetency in the English law — Incompetency from interest.*

§ 137. Our common rules of incompetency seem to have been copied from the civil law, which, however, carried the principle of exclusion much further: and, indeed, our ancestors probably saw, what is obvious

<sup>1</sup> Tayl. Evid. § 1252, 4th Ed.; Rosc. Cr. Evid. 121, 122, 5th Ed.; 1 Greenl. Ev. § 328, 7th Ed. For the discrepancy in the American authorities on this subject, see Appleton on Evidence, 22, 23, 269, 270; and Taylor in loc. cit. note (1). See further on the subject of oaths, Introd. §§ 56 *et seq.*

<sup>2</sup> *Maden v. Catanach*, 7 H. & N. 360; Peake's Ev. 141, 5th Ed.; Ph. & Am. Ev. 8 *et seq.*; 1 Greenl. Ev. § 328, 7th Ed.; Judgments of the Barons of the Exchequer in *Miller v. Salomons*, 7 Exch. 475; *affir. on error*, 8 Exch. 778.



enough in itself, that although an extended prohibition \*of suspected evidence may be valuable under a system where all questions of law and fact [ \* 199 ] are decided by a single judge, it is misplaced in a country where the tribunal has the aid of a jury, acting either as judges of fact, as at the present day, or as witnesses, as in former times.<sup>1</sup> So soon therefore as the modern law of evidence began to assume its present form, *i. e.*, in the latter half of the seventeenth and beginning of the eighteenth centuries, the attention of our judges and lawyers naturally became much turned to this question: when the advancing opinions of the age, the then fully recognized principle that the jury are not witnesses, but are judges of the facts in dispute,<sup>2</sup> and the hopelessness of attempting to reconcile the chaos of decisions in the old books on the incompetency of witnesses, showed the imperative necessity of recasting the system. We have already seen how the law respecting oaths was settled by the case of *Omychund v. Barker*, in 1745,<sup>3</sup> and with respect to another very important branch of the subject — the incompetency of witnesses on the ground of *interest* — the Court of Queen's Bench in Lord Kenyon's time laid down, as a clear and certain rule for the future, that, in order to render a witness incompetent on that ground, it must appear *either* that he was directly interested in the event of the suit; *or* that he could avail himself of the verdict in the cause, so as to give it in evidence on some future occasion in support of his own interest.<sup>4</sup> >

<sup>1</sup> See bk. 1, pt. 2, § 119.

<sup>2</sup> *Id.*

<sup>3</sup> *Suprà*, § 135.

<sup>4</sup> *Bent v. Baker*, 3 T. R. 27; *Smith v. Prager*, 7 T. R. 60. See, also, *R. v. Boston*, 4 East, 572; and *Doe d. Lord Teynham v. Tyler*, 6 Bingh. 390.

§ 138. This rule having become pure matter of legal history, it would be useless to refer to the numerous cases illustrative of its extent and meaning which are to be found in the books. It will be sufficient to state a [ \* 200 ] \*few general principles. First, the rule drew a distinction between an interest in the *question* and interest in the *event of the suit*. However strong a witness's bias on the subject of the suit, or his hopes of obtaining some benefit from the result of the trial, might be, these formed no objection to his competency unless he had a direct interest in its *event*. Thus, if two actions were brought against two persons for the same assault, in the action against one the other would be a competent witness, because he was not interested in the *event*. So, where an action was brought against an underwriter on a policy of insurance, another underwriter on the same policy was held a competent witness for the defendant, for the same reason.<sup>1</sup> Again, the interest, to disqualify, must have been a certain interest, and a legal existing interest. If it existed merely in the imagination, or belief, or expectation of the witness, he would not be incompetent, however strongly the objection might be urged against his credibility.<sup>2</sup> But no matter how small and inconsiderable the amount of the legal interest might have been, the witness was incompetent.<sup>3</sup> Where, however, a witness was incompetent on the ground of interest, the incompetency might be removed by a release from liability; and such releases were very common in practice.

§ 139. As the law of evidence continued to improve, the subject of interested witnesses continued to attract

<sup>1</sup> *Bent v. Baker*, 3 T. R. 27

<sup>2</sup> Ph. & Am. Ev. 92.

<sup>3</sup> Ph. & Am. Ev. 81.

more and more attention. The rule laid down in *Bent v. Baker*, and the other cases which have been cited, was indeed well defined, and on the whole as good as any that could be devised on such a subject; but the inconsistency of its application, and its inefficiency, even in its professed object of obtaining unsuspected evidence, were obvious. It is impossible to calculate, by \*any rule laid down *à priori*, the influence which interest in a given cause or in the event [\* 201] of a given suit will exercise on the mind of a given individual. On some minds a very slight interest would act sufficiently to induce perjury, on others very great interests would be powerless. Again, it being equally impossible to detect the numberless ways in which parties may be directly or indirectly interested in a particular event, the rule of exclusion was restricted to the case of *legal* interest in the event of the suit; the consequence of which was, that parties were often competent to give evidence who were swayed by the strongest *moral* interests to pervert the truth. Thus the heir apparent to an estate, however large, was a competent witness for his ancestor in possession, on an ejectment brought by a stranger claiming the property; while in an ejectment against a tenant for life, a remainder man having a legal interest to the amount of the smallest coin in the realm was not competent to give evidence for the defendant.<sup>1</sup> We have already alluded to the cases of separate actions against several persons for the same assault, and of an action against one of several underwriters.<sup>2</sup> And though last not least—in the very teeth of the maxims, “*nemo in propria causa testis esse debet*,”<sup>3</sup> and “*repellitur à sacramento infamis*,”<sup>4</sup>

<sup>1</sup> 1 Ph. & Am. Ev. 91, *et seq.*

<sup>2</sup> *Suprà*, § 138.

<sup>3</sup> 1 Blackst. Comm. 443; 3 Id. 371.

<sup>4</sup> Co. Litt. 158 a; Willes, 667.

any man might (and still may) in legal strictness be convicted, even of a capital offense, on the unsupported evidence of a person avowing himself an accomplice in his crime; \* who is taken out of jail to bear testimony against his alleged companion, who gives that testimony under an [ \* 202 ] *implied* promise of \*pardon; and who, being on his own confession liable to execution if the government should be dissatisfied with his conduct in this respect, may be said to be giving it with a rope round his neck, and thus influenced by the strongest of all earthly motives to procure the condemnation of the accused. In short, it at length became visible that interest should be an objection to the *credit*, not to the *competency* of a witness; but the law and practice were too firmly settled to be altered without the aid of the legislature.

§ 140. Without stopping to refer to various statutes, passed from time to time, by which interested parties and witnesses were rendered competent in particular cases, we will proceed to the first *general* enactment on the subject, the 3 & 4 Will. 4, c. 42, ss. 26 and 27, which enacted, that if a witness should be objected to as incompetent, on the ground that the verdict or judgment in an action on which it was proposed to examine him would be admissible in evidence for or against him, such witness should nevertheless be examined; but a verdict or judgment in that action, in favor of the party on whose behalf he should have been examined, should not be admissible in evidence for him or any one claiming under him, nor should a verdict or judgment against the party on whose behalf he should

<sup>5</sup> *R. v. Boyes*, 1 B. & S. 311; *R. v. Stubbs*, 1 Dears. 555; *R. v. Attwood*, 1 Leach, C. L. 464, and 466, note; *R. v. Durham*, Id. 478; *R. v. Jones*, 2 Campb. 132; 28 Ho. St. Tr. 487, 488; 31 Id. 315; *R. v. Hastings*, 7 C. & P. 152; *R. v. Wilkes*, Id. 273; *R. v. Sheehan*, Jebb, Cr. C. 54.

have been examined, be admissible in evidence against him or any one claiming under him; and that the name of every witness objected to as incompetent on the above ground, should be indorsed on the record or document on which the trial should be had, together with the name of the party on whose behalf he was examined, and entered on the record of the judgment; and such indorsement or entry should be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment should be offered in evidence.

*Incompetency from infamy of character.*

\*§ 141. This statute, at best but a palliative of the evil, was virtually repealed by the 6 & 7 [ \* 203] Vict. c. 85. But before stating its provisions, we must advert to another ground of incompetency which has been altogether abolished by it, viz., *infamy of character*; respecting which, as also the ways in which the disability could be removed, much is to be found in the books. The objections to incompetency on the ground of interest apply here with at least equal force. The principle of the exclusion seems to have varied in different cases. In some — as where the witness had been convicted of perjury, forgery, and the like — it rested, in part at least, on the notion that his testimony was likely to prove mendacious: but the wide range of the rule clearly shows that this form of incompetency, like that for disfavored religious opinions, was occasionally imposed as a punishment, in order that, by refusing to allow the witness to give evidence in a court of justice, he might be rendered a marked person in society. And this seems supported by the circumstance that at common law a pardon, even for perjury, restored the competency of the witness and made

him a new man.<sup>1</sup> But, whatever the reason, “*repellitur à sacramento infamis*”<sup>2</sup> was the rule of law; and in determining what offenses should be deemed infamous, an artificial distinction was taken, which caused the whole system to work very unevenly. We allude to the distinction between the “*infamia juris*” and the “*infamia facti*,”—between the infamy of an offense viewed in itself and that arbitrarily attributed to it by law,<sup>3</sup>—it being a principle that some offenses, although “*minoris culpæ*,” [ \* 204] \* were “*majoris infamiæ*.”<sup>4</sup> It would be loss of time to enumerate with nicety the offenses which are deemed infamous by law; it will be sufficient to say that treason and felony stood at their head, though an exception was created by 31 Geo. 3, c. 35, in favor of petit larceny, before the distinction between it and grand larceny was abolished.<sup>5</sup> A conviction for misdemeanor did not in general render a witness incompetent; but to this there was the general exception of offenses coming under the description of the *crimen falsi*—such as forgery, perjury, subornation of perjury, various forms of conspiracy, and the like.<sup>6</sup> Still every crime involving falsehood or fraud had not this effect.

§ 142. In all cases the incompetency was created, not by the conviction, for that might have been quashed on

<sup>1</sup> We say *at common law*; for it was otherwise on a conviction of perjury under the 5 Eliz. c. 9, made perpetual by 21 Jac. 1, c. 28, s. 8. The difference is, that in the former case the disqualification only followed as a consequence from the judgment; whereas in the latter it was by the statute made part of the punishment. See this subject fully investigated in 2 Hargrave's *Jurid. Argum.* 221.

<sup>2</sup> Co. Litt. 158 a; Willes, 667

<sup>3</sup> Ph. & Am. Ev. 14.

<sup>4</sup> Co. Litt. 6 b.

<sup>5</sup> Ph. & Am. Ev. 17.

<sup>6</sup> Id.

motion in arrest of judgment,<sup>1</sup> but by the judgment of the court pronounced against the offender, and which must have been proved in the usual way<sup>2</sup>—the maxim being “*ex delicto non ex supplicio emergit infamia*.”<sup>3</sup> Incompetency on the ground of infamy was removable of course by reversal of the judgment, and, in general, by pardon,<sup>4</sup> or by having undergone the punishment awarded for the offense.<sup>5</sup> (a)

<sup>1</sup> Id. 20.

<sup>2</sup> Id. 19, 20.

<sup>3</sup> Ph. & Am. Ev. 18.

<sup>4</sup> § 141.

<sup>5</sup> *Pendock d. Mackinder v. Mackinder*, Willes, 665.

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(a) In order to disqualify a witness from giving evidence, he must have been *convicted* of a felony. The mere fact that he has been *indicted* does not disqualify him, nor does it affect his credit, consequently cannot be shown to impeach or in any manner affect his evidence. *Com. v. Gorham*, 99 Mass. 420; *Lipe v. Eisenlerd*, 32 N. Y. 229.

It is not the *punishment* visited upon a particular crime that furnishes the test of disqualification, but the *infamy* of the crime. *Rex v. Davis*, 5 Mod. 75; *Pendock v. Mackinder*, 2 Wils. 18; 1 Starkie on Ev. 76; *Rex v. Crosby*, 12 Mod. 72; *People v. Whipple*, 8 Cow. (N. Y.) 707; *United States v. Brockins*, 3 Wash. C. C. (U. S.) 99; *Cole v. Cole*, Harr. & J. (Md.) 572; *Clarke v. Hull*, 2 Har. & McHen. 378.

The act, or rather *the crime*, must have been such as from its *very nature* is inconsistent with common honesty, and involves that degree of moral turpitude that warrants the presumption that a person guilty of it is so far destitute of moral honesty, as to be unreliable as a witness, in cases involving the lives, liberty or property of others. Lofft's (Gilbert) Evidence, 256; 1 Starkie on Ev. 76; *People v. Whipple*, *ante*.

Therefore the *measure* of punishment is not the test, but the *crime itself*, and, even though the punishment is by *fine* simply, and not by imprisonment, disqualification may result.

In the language of the court in the case of *Ville de Varsovie*, Dod's Rep. 188, the crime must have been such that “the law considers it to imply such a dereliction of moral principle on the part of the witness as carries with it the conclusion, that he would entirely disregard the nature of an oath,” see Phillips on Ev., vol. 1, p. 15; or, in the language of Baron Gilbert in Lofft's Ev. 143, such “that the stain of his iniquity overbalances the credit of his oath.”

§ 143. The next statute on the present subject was, as has been stated, 6 & 7 Vict. c. 85. After reciting that the inquiry after truth in courts of justice was often

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It may be well said that this branch of the law does not in all cases rest upon sound principle, and is not always supported by human experience or common sense. Therefore it is that no general rule can be given which will enable the practitioner or the courts to determine the question of competency in all cases, and, as a result, in the absence of statutory provisions courts are guided wholly by the decisions, and exclude witnesses only in those cases where a conviction for the particular crime has been held to disqualify, without regard to the *reason* or the *soundness* of the rule.

Thus, a person convicted of treason is held to be disqualified as a witness, when it is well known, that often, indeed generally, a person committing the crime may be actuated by the highest motives, and may be possessed of the most refined sense of honor and morality. Therefore, in cases of this character, the rule is predicated upon *public policy*, and intended as an *added punishment* for the offense, rather than upon the ground that the offense itself is of a character that shows the person convicted of it destitute of moral honesty, and not entitled to credit as a witness. Indeed, in all cases, it is extremely questionable whether, except as an added punishment for crime, and as having some tendency to prevent it, it would not be better to admit *all* persons to testify, and allow evidence of their conviction of crimes to be given to affect their credibility, leaving the courts and jurors to judge of the value of their evidence in view of the evidence itself and the character of the witness.

Latterly, courts limit and narrow the rules as much as possible, and owing to the difficulty in making proof of conviction, in most cases, very few persons are excluded from testifying, and in many of the States this disqualification is removed by statute.

In most of the States provision is made by statute as to a conviction of what crimes shall disqualify a witness from giving evidence in a court. The disqualification generally embraces only those crimes regarded as infamous, as treason, felony, and every species of *crimen falsi*, as perjury, subornation of perjury, forgery, and such other offenses as affect the public administration of justice. A person convicted of *embezzlement*, and undergoing his sentence for that crime, is held not to be disqualified as a witness; *Schuyllkill v. Copely*, 67 Penn. St. 386, or a person convicted of being a receiver of stolen goods; *Commonwealth v. Murphy*, 3 Penn. L. J. 290; and in New York, by statute, a prisoner is a competent witness on his own behalf, even though he has been convicted of a felony; *Delamater v. People*, 5 Lans. (N. Y.) 332; and in order to set up the fact of a conviction of the witness of a felony, to affect his credibility, the record of his conviction alone can be used; *Matter of Real*, 55 Barb. (N. Y.) 186; and a witness cannot be questioned on cross-examination as to whether he has not been convicted of a crime; *Tift v. Moor*, 59 Barb. (N. Y.)



obstructed by incapacities created by the then existing law, and it was desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons appointed to decide upon \* them, and that such persons should exercise [\* 205 ] their judgment on the credit of the witnesses ad-

619 ; but if the respondent in a criminal case puts himself upon the stand, he may be compelled to answer whether he has not been before *arrested* for a crime. *Brandon v. People*, 42 N. Y. 265.

In North Carolina a prisoner under sentence of death for a felony is regarded as a competent witness. *State v. Harston*, 63 N. C. 294.

But the fact that a witness has been convicted of *any* crime may always be shown as affecting his credit. This must always be proved by a copy of the record of conviction, and cannot be established by parol. It is not the mere conviction of crime, but only the *judgment* on the conviction, that can be used to discredit a witness. A person may be convicted, and yet the conviction be set aside, and a judgment finally rendered in his favor ; therefore courts require a copy of the record of the judgment upon conviction. *State v. Valentine*, 7 Ired. (N. C.) 229 ; *People v. Whipple*, 8 Cow. (N. Y.) 707 ; *Dawley v. State*, 4 Ind. 410.

Thus, it has been held that the mere fact that a witness has been indicted for perjury and forgery, which has not been followed by a trial and conviction, and the conviction followed by a judgment thereon, is not disqualified as a witness, and the fact cannot be used to affect his credibility. *Jackson v. Osborn*, 2 Wend. (N. Y.) 555.

The record of the conviction of a person, for an infamous crime in another State, will not generally disqualify him as a witness, but may be used to affect his credibility. *Com. v. Green*, 17 Mass. 515 ; *Com. v. Knapp*, 9 Pick. (Mass.) 446.

The record of a conviction of a witness for a felony is admissible as affecting his credibility even though he has been pardoned. *Curtis v. Cochran*, 50 N. H. 242.

When a person has been convicted of an infamous crime, testimony given by him in a former trial, prior to his conviction, cannot be used in evidence. *Le Barron v. Crombie*, 14 Mass. 234.

A person convicted of theft cannot be admitted as a witness. *State v. Gardner*, 1 Root (Conn.), 485. The attempt to dissuade a witness, or procure his non-attendance upon a trial, does not disqualify, even though the witness has been subpœnaed. *State v. Keyes*, 8 Vt. 57.

In Indiana, it is held that a conviction for petit larceny does not render a witness incompetent. This decision was made prior to the adoption of the Practice Act of 1852, by which in that State neither the conviction for crime, nor the interest of a witness, disqualify. *Pruit v. Miller*, 3 Ind. 16.

duced and on the truth of their testimony: it enacted as follows, "No person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person, having, by law or by consent of parties, authority to hear, receive, and examine evidence; but every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offense: Provided that this act shall not render competent any party to any suit, action or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such person respectively." Then followed two other provisos, namely, that the Wills Act, 7 Will. 4 & 1 Vict. c. 26, should not be affected by the statute; and that in courts of equity a defendant might be examined as a witness on the behalf of the

\* plaintiff or of any co-defendant, saving just exceptions ; and any interest which such defendant so to be examined might have in the matters or in any of the matters in question in the cause, should not be deemed a just exception to the testimony of such defendant, but should only be considered as affecting or tending to affect the credit of such defendant as a witness. The first of the above three provisos is repealed, so far as relates to parties to civil proceedings, by the 14 & 15 Vict. c. 99, s. 1, and with respect to their husbands and wives by 16 & 17 Vict. c. 83, s. 4. [\* 206 ]

*Expediency of rejecting witnesses as incompetent.*

§ 144. Not only is the inclination of our modern judges and lawgivers in favor of receiving the evidence of witnesses, leaving its value to be estimated by the jury, but the propriety of expunging from our jurisprudence the title "Incompetency of witnesses" has been strongly and ably advocated, as well as candidly and temperately defended.<sup>2</sup> For reasons stated in the Introduction to this work,<sup>3</sup> it seems that, for general purposes at least, the principle of incompetency ought to be confined to *pre-appointed*, as contradistinguished from *casual* evidence ; and the legislature has of late years inclined to this view. While, on the one hand, it has almost abolished the rules rejecting casual witnesses as incompetent, it has, on the other, interposed with regulations requiring certain important pieces of pre-appointed evidence to be attested in some particular way. Thus, the 6 & 7 Vict. c. 85, which, as we have seen, removes all objections to competency on the ground of interest in most cases, and of infamy in all, contains an express pro-

<sup>1</sup> See those statutes, *infra*.

<sup>2</sup> Introd. pt. 2, § 62.

<sup>3</sup> Id.

viso, that nothing in it shall repeal the Wills Act, 7 Will. 4 & 1 Vict. c. 26, by which (explained by 15 & 16 Vict. c. 24), all wills must be in writing and attested by two or more witnesses; and the 15th section enacts that if [ \* 207 ] \*a will contains any beneficial devise, legacy, gift, &c., to an attesting witness, it shall be void, in order that he may be competent to prove the execution of the will. And the 32 & 33 Vict. c. 62, s. 24, requires that all cognovits and warrants of attorney to confess judgment shall be subscribed by an attorney, acting on behalf of the party by whom they are executed, and expressly named by him.

*Grounds of incompetency still existing in our law.*

§ 145. We now proceed to consider more in detail the three grounds of incompetency which still exist in our law, namely, 1°. Incompetency from want of reason and understanding; 2°. Incompetency from want of religion; and 3°. Incompetency from interest.

1°. *Incompetency from want of reason and understanding* — 1. *Deficiency of intellect.*

§ 146. 1°. Incompetency from want of reason and understanding. The causes of this incompetency are twofold; — *Deficiency* of intellect; and *Immaturity* of intellect. The objection on the first of these grounds rarely presents itself to the *competency* of a witness, and if the defect appears in the course of his examination it is usually made matter of comment to the jury.

§ 147. Our books lay down generally that persons of “non-sane memory,” and who have not the use of reason,

are excluded from giving evidence;¹ but they are not quite agreed as to the reason of this—some basing it on the ground that such persons are insensible to the obligation of an oath;² while others, with more justice, say it is because all persons who are examined as witnesses must be fully possessed of their understanding, — that is, of such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and [ \* 208 ] \*wrong.³ Probably both reasons have had their influence.⁴ According to the Roman law, “*Furiosus absentis loco est.*”⁵

§ 148. But who are thus excluded? What is the extent of the rule? A man of “non-sane memory” is defined by Littleton “*qui non est compos mentis.*”⁶ This is corroborated by Sir E. Coke in his Commentary,⁷ who adds, “Many times, as here it appeareth, the Latin word explaineth the true sense, and (Littleton) calleth him not *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus*, *stultus*, or the like, for *non compos mentis* is most sure and legal. He then goes on, “Non compos mentis is of four sorts. 1. An idiot, which from his nativity, by a perpetual infirmity, is non compos mentis. 2. He that by sickness, grief, or other accident, wholly loses his memory and understanding. 3. A lunatic that hath sometime his understanding and sometime not,

¹ Com. Dig. Testmoigne, A. 1; Co. Litt. 6 b, Ph. & Am. Ev. 4; Peake, Ev. 122, 5th Ed.

² 1 Greenl. Ev. § 365, 7th Ed.; Tayl. Ev. § 1247, 4th Ed.

³ Peake's Ev. 122, 5th Ed.

⁴ Ph. & Am. Ev. 4.

⁵ Dig. lib. 50, tit. 17, l. 124, § 1: See also 4 Co. 125 b. 126 a.

⁶ Litt. sect. 405.

⁷ Co. Litt. 246 b.

‘*aliquando gaudet lucidis intervallis*,’ and therefore he is called ‘*non compos mentis*’ so long as he hath not understanding. 4. Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, and he that is drunken.” A similar classification is adopted in modern works on evidence. These four sorts of persons are incompetent witnesses until the cause of incompetency is removed. Thus, although a person deaf and dumb from birth is presumed by law to be an idiot,<sup>2</sup> yet if he can be communicated with either by signs and tokens,<sup>3</sup> or by writing,<sup>4</sup> and it appears that he is possessed of intelligence, and [ \* 209 ] \*understands the nature of an oath, he may be examined as a witness. In one case, where it appeared that such a person could write, Best, C. J., doubted whether he ought not to be compelled to give his evidence in that way, and not by signs;<sup>5</sup> but it would be difficult to maintain this as a proposition of law, even supposing it to hold good as a principle of convenience. Neither of these modes of giving evidence is derivative from or secondary to the other; besides which, a deaf and dumb witness might be very expert in making and understanding signs, and yet express his thoughts very indifferently in writing. In a much more recent case, before Lord Campbell, which was an action for seduction, the seduced party was deaf and dumb, but could write very well, and two letters written by her to the defendant were put in evidence. Her examination

<sup>1</sup> Ph. & Am. Ev. 4; 1 Greenl. Ev. § 365, 7th Ed.

<sup>2</sup> 1 Hale, P. C. 34.

<sup>3</sup> 1 Phill. Ev. 7, 10th Ed.; *R. v. Ruston*, 1 Leach, C. L. 408; *R. v. Steel*, Id. 452.

<sup>4</sup> 1 Ph. Ev. 7, 10th Ed.; *Morrison v. Lennard*, 3 C. & P. 127.

<sup>5</sup> *Morrison v. Lennard*, 3 C. & P. 127.

in court, however, was chiefly carried on by signs, and occasionally, when these were not understood, by writing.<sup>1</sup> So a lunatic while in a lucid interval is a competent witness :<sup>2</sup> but whether the evidence of a monomaniac, *i. e.*, a person insane on only one subject, can be received on matters not connected with his delusion, was unsettled until recently ; and some text writers thought it the safest rule to exclude the testimony of such persons, it being impossible to calculate with accuracy the extent and influence of such a state of mind.<sup>3</sup> This would be hard measure. A monomaniac may perfectly understand the nature and obligation of an oath ; his general intellect may equal or surpass that of his interrogators, and indeed he seems much in the condition of a lunatic who is in a perpetual lucid state on all subjects save one. A medical man, eminent in the treatment of the insane, deposed in our presence, in a court of justice, that while \*he was physician to a large lunatic establishment, some alterations were required in the [ \* 210 ] building, and that the best plans for the purpose, and those which were ultimately adopted, were sent in by one of the insane patients. In Ray's Medical Jurisprudence of Insanity,<sup>4</sup> is mentioned a case tried before the Supreme Court for the county of Lincoln, in Maine, America, in May, 1833, in which a witness was produced who was perfectly sane and satisfactory in his evidence on all points, except that he believed himself to be an inspired apostle. And on an application to the Court of Exchequer for a habeas corpus ad testificandum, to bring

<sup>1</sup> *Bartholomew v. George*, Kent Sp. Ass. 1851, MS.

<sup>2</sup> Com. Dig. Testmoigne, A. 1 ; Ph. & Am. Ev. 5.

<sup>3</sup> Roscoe, Crim. Ev. 123, 4th Ed. by Power.

<sup>4</sup> § 304. *Case of Jacob Schwartz*.

up the body of a person confined as a lunatic, Parke, B., said : "If you make an affidavit that he is not a dangerous lunatic, and that he is in a fit state to be brought up, the habeas corpus should be granted." :

§ 149. This question seems now set at rest by the case of *R. v. Hill*,<sup>2</sup> decided by the Court of Criminal Appeal. The accused, who was attendant of a ward in a lunatic asylum, was indicted for the manslaughter of one of the patients under his care. At the trial before Coleridge and Cresswell, JJ., at the Central Criminal Court, it being opened by the prosecution that a witness of the name of Donelly would be called, who was a patient in the same ward with the deceased, evidence was gone into on both sides in order to found and meet the objection to his competency. A witness stated that Donelly labored under the delusion that he had a number of spirits about him continually talking to him ; but that that was his only delusion : and two medical witnesses deposed that he was rational on all points not connected with it, while one added that he was quite capable of giving an account of any transaction that [ \* 211 ] \*happened before his eyes. Donelly was then called, and before being sworn was examined by the prisoner's counsel. He said, "I am fully aware that I have a spirit, and 20,000 of them ; they are not all mine ; I must inquire — I can where I am ; I know which are mine. Those ascend from my stomach to my head, and also those in my ears ; I do not know how many they are. The flesh creates spirits by the palpitation of the nerves and the 'rheumatics ;' all are now in my body and round my head ; they speak to me incessantly — particu-

<sup>2</sup> *Fennell v. Tait*, 1 C. M. & R. 584.

<sup>3</sup> 2 Den. & P. C. C. 254.



larly at night. That spirits are immortal I am taught by my religion from my childhood, no matter how faith goes : all live after my death, those that belong to me and those which do not ; Satan lives after my death, so does the Living God." After more of this kind, he added, "They speak to me constantly ; *they are now speaking to me* ; they are not separate from me ; they are round me, speaking to me now ; but I can't be a spirit, for I am flesh and blood ; they can go in and go out through walls and places which I cannot. I go to the grave, they live hereafter — unless, indeed, I have a gift different from my father and mother that I do not know. After death my spirit will ascend to Heaven, or remain in purgatory. I can prove purgatory. I am a Roman Catholic ; I attended Moorfields, Chelsea chapel, and many other chapels round London. I believe purgatory ; I was taught that in my childhood and infancy. I know what it is to take an oath ; my catechism taught me from my infancy when it is lawful to swear ; it is when God's honor, our own or our neighbor's good require it. When man swears, he does it in justifying his neighbor on a Prayer-book or obligation. My ability evades while I am speaking, for the spirit ascends to my head. When I swear, I appeal to the Almighty ; it is perjury the breaking a lawful oath or taking an unlawful one ; he that does it will go to hell for all eternity." He was \*then sworn, and, [ \* 212 ] says the report, *gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed.* He was in some doubt as to the day of the week on which it took place, and, on cross-examination, said, "These creatures insist upon it it was Tuesday night, and I think it was Monday ;" whereupon he was asked, "Is what you have told us what the spirits

told you, or *what you recollect without the spirit?*" and he said, "No; *the spirits assist me in speaking of the date*; I thought it was Monday, and they told me it was Christmas Eve—Tuesday; but I was an eye witness, an ocular witness, &c." The court received his evidence, reserving the question of his competency for the Court of Criminal Appeal. The accused having been convicted, the case was argued before Lord Campbell, C. J., Coleridge and Talfourd, JJ., and Alderson and Platt, BB.; when the counsel for the prisoner contended, that Donelly was *non compos mentis*, and a lunatic within the legal definition of that term, and that as soon as any unsoundness of mind is manifested in a witness he ought to be rejected as incompetent, citing, *inter al.*, Com. Dig. Testmoigne, A 1. The court, however, without hearing counsel on the other side, unanimously upheld the conviction. Lord Campbell, in delivering his judgment, said, "The question is important, and has not yet been solemnly decided after argument. But I have no doubt that the rule was properly laid down by Parke, B., in the case that was tried before him, and that it is for the judge to say whether the insane person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath; and then the jury are to decide on the credibility and weight of his evidence. As to the authorities that have been cited, the question is, in what sense the term '*non compos*' was there used. A man may, in one sense, be *non compos*, and yet be aware of the nature and sanction  
[ \* 213 ] \* of an oath. In the particular case before the court, I think that the judge was right in admitting the witness; I should have certainly done so myself. \* \* \* It has been argued that any particular delusion, commonly called monomania, makes a man inad-

missible. This would be extremely inconvenient in many cases in the proof either of guilt or innocence: it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the judge must, in all such cases, determine the competency, and the jury the credibility. Before he is sworn, the insane person may be cross-examined, and witnesses called to prove circumstances which might show him to be inadmissible; but, in the absence of such proof, he is *primâ facie* admissible, and the jury must attach what weight they think fit to his testimony." Talfourd, J., observing, "It would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions;" — Lord Campbell added, "The rule which has been contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him."<sup>1</sup>

§ 150. But while our books point out the various causes of mental alienation which disqualify from giving evidence, they say little or nothing as to the intensity of it required for this purpose. In truth there are two, if not more, distinct standards of mental alienation known to the law. First, that which is sufficient to exculpate from a criminal charge: and here it is settled that ordinary lesion of intellect is not sufficient — there must be such an absence of intellect that the accused, when he did the act, was unconscious that he was committing a crime prohibited by law.<sup>2</sup> 2nd. The degree of insanity \*which will support a commission of lunacy. In the time of Lord Eldon the Court of [ \* 214 ]

<sup>1</sup> See *Waring v. Waring*, 6 Mo. P. C. C. 341.

<sup>2</sup> Answer of the judges to the House of Lords, 8 Scott, N. R. 595; 1 Car. & K. 130; *R. v. Higginson*, Id. 129; *R. v. Vaughan*, 1 Cox, Cr. Ca. 80.

Chancery assumed, perhaps usurped, the jurisdiction of issuing commissions of lunacy against "persons of unsound mind," *i. e.*, persons in a state contradistinguished from idiocy and lunacy,—a state of mental imbecility and incapacity to manage their affairs.<sup>1</sup> 3rd. The degree of unsoundness of mind which will avoid contracts, deeds, wills, and the like, seems to hold an intermediate place between these.<sup>2</sup> Calm reflection will convince that if mental alienation is to be retained in our law as a ground of incompetency, it should be restricted to cases where it is found impossible to communicate with the witness, so as to make him understand that he is in a court of justice and expected to speak the truth. Any eccentricities or aberrations which fall short of this are surely only matter of comment to the jury, on the reliance to be placed on his testimony. And here it is important to observe once for all, that when reading what our old lawyers have written on the subject of insanity, we should never forget how little the subject was understood in their days, and the shocking mistakes in the treatment of the insane which then prevailed. As some one has observed, "their notions of insanity were founded on observation of those wretched inmates of the madhouse whom stripes and chains, cold and filth, had degraded to the stupidity of an idiot, or exasperated to the fury of a demon." Now the researches of modern physiologists have shown, that madness is not an infliction sent direct from Heaven, but a bodily disease, which may often be completely cured; and that there are many inferior forms of diseased or disordered mind and imagina-

<sup>1</sup> Shelford on Lunacy, pp. 5, 104, 2nd Ed.

<sup>2</sup> See *Smith v. Tebbitt*, L. R., 1 P. & D. 398; *Bridgeman v. Green*, Wilmot's Notes, 58; *Blackford v. Christian*, 1 Knapp, P. C. C. 73, 78.

tion, \*which influence the conduct of persons who are, in other respects, perfectly capable of [ \*215 ] taking care of themselves and transacting the ordinary business of life.<sup>1</sup> Some even go so far as to assert that there exists a form of the disease, to which they have given the name of "moral insanity," in which no *delusion* of any kind exists ; but the patient's moral character is revolutionized, and he is hurried against his will, by some uncontrollable impulse, into the commission of acts of violence and crime.<sup>2</sup> Although this state of mind is not recognized in our jurisprudence, and its existence as matter of fact is extremely questionable, still the above discoveries show how arbitrary and imperfect any line drawn by law on such a subject as the present must necessarily be ; and, as an eminent modern writer well expresses it, "The subtile and shifting transformations of wild passions into maniacal disease, the returns of the maniac to the scarcely more healthy state of stupid anger, and the character to be given to acts done by him when near the varying frontier which separates lunacy from malignity, are matters which have defied all the sagacity and experience of the world."<sup>3</sup>

<sup>1</sup> Viewing the subject in a physiological light, Dr. Beck, in his *Medical Jurisp.* ch. 13, 7th Ed., enumerates the following forms of mental alienation : —1. Mania ; 2. Monomania (including melancholy) ; 3. Dementia ; 4. Incoherent madness (holding a sort of middle place between mania and dementia) ; 5. Congenital idiotism ; besides various subdivisions. He also (p. 387 *et seq.*) mentions some forms of disease, which, either in a partial or temporary manner, bear a strong resemblance to insanity. These are the delirium of fever, hypochondriasis, hallucination, epilepsy, nostalgia, delirium tremens, &c.

<sup>2</sup> Beck's *Med. Jurisp.* 436, 477, 7th Ed. ; Dr. F. Winslow, in the *Papers of the Juridical Society*, vol. 1, p. 595, &c.

<sup>3</sup> Sir J. Mackintosh's *Hist. Engl.* vol. 3, p. 36.

*Immaturity of intellect — testimony of children.*

§ 151. Next, with respect to the evidence of children. *Immaturity* of intellect is of course a ground of incompetency as much as natural defect or subsequent deprivation \*of it. But there is another difficulty [ \* 216 ] in dealing with this subject, namely, that while the intellect of a child may not be sufficiently developed, to enable him to give an intelligible account of what he has seen or heard, he may not have been taught the nature and obligation of an oath; and although in the case of an adult witness the want of early religious education may have been supplied by experience or reflection, it would be idle to look for these in a person of tender years. For these reasons the testimony of children has always been a source of embarrassment to tribunals, and the laws of many nations cut, instead of attempting to unravel, the knot, by arbitrarily rejecting such testimony when the child is under a definite age <sup>1</sup> — a course objectionable on

<sup>1</sup> The general rule of the civilians, subject however to several exceptions, was, that persons under the age of puberty were incompetent to give evidence (Huberus, *Præl. Jur. Civ.* lib. 22, tit. 5, n. 2, iv.; Mascard. de Prob. Concl. 1253; 1 *Ev. Poth.* § 789). Some of their authorities say that minors under twenty years were rejected in criminal cases. Mascard. de Prob. Concl. 1320, N. 9 *et seq.*; and 1253, N. 14. This rule appears to have been based on the language of the Digest; lib. 50, tit. 17, l. 2, § 1,—"Impubes omnibus officiis civilibus debet abstinere;" but more particularly on lib. 22, tit. 5, l. 3, § 5,—"Lege Julia de vi cavetur, ne hac lege in reum testimonium dicere liceret, qui se ab eo, parente ejus liberaverit: quive impuberes erunt, &c."—rather a frail foundation for the position that the jurisprudence of ancient Rome rejected the testimony of minors *in general*; for the law just quoted only does so on certain capital charges of public violence. Expressio unius est exclusio alterius; and we have the positive testimony of Quintilian, that in his time the evidence even of very young children was occasionally received, or at least not rejected as matter of course. See *Inst. Orat.* lib. 5, c. 7, *ver. fin.*; and Pothier *in loc. cit.* The Hindu law seems to have rejected the evidence of minors under fifteen,—an age in that climate corresponding probably to twenty or more in ours. Translation of Pootee, c. , sect. 8, in Halhed's Code of Gentoo Laws.

many grounds; and principally as it all but proclaims impunity to certain offenses of a serious nature against the persons of children, which it is next to impossible to establish without receiving their account of what has taken place. \*Besides, children of the same age differ so immensely in their powers of observation and [ \* 217 ] memory that no fixed rule, even approximating to the truth, can be laid down. In this case at least it may truly be said, "Nature makes her mock of those systems of tactics which human industry presents as leading-strings to human weakness."<sup>1</sup>

### *Old law.*

§ 152. As to the old law on this subject. Our ancestors adopted the maxim "minor jurare non potest,"<sup>2</sup> but with some exceptions — at the age of twelve years, for instance, an infant might be called upon to take the oath of allegiance, &c.<sup>3</sup> And although, as will be shown presently, the evidence of children was often rejected, it was not solely on the ground of their supposed incapacity to take an oath; for a difficulty was likewise felt in fixing the age at which they should be held responsible to the criminal law — a matter now fully settled thus, that for this purpose fourteen is, with some few exceptions, full age; that between seven and fourteen an infant is presumed to be *doli incapax*, but may be shown to be otherwise; but that under seven there is (whether rightly or not) a *præsumptio juris et de jure* that he cannot have a mischievous discretion.<sup>4</sup>

<sup>1</sup> 3 Benth. Jud. Ev. 304.

<sup>2</sup> Co. Litt. 172 b.

<sup>3</sup> Co. Litt. 68 b, 78 b, 172 b.

<sup>4</sup> Blackst. Comm. 22, 23; 1 Hale, P. C. 20 *et seq.*; and *infra*, bk. 3, pt. 2, ch. 2.

*Gradual changes in it.*

§ 153. Sir Edward Coke in his 1st Institute <sup>1</sup> states broadly that a person "not of discretion" cannot be a witness; and in another part of the same work <sup>2</sup> he defines the age of discretion to be fourteen years. More than half a century later, Sir Matthew Hale, in his Pleas of the Crown,<sup>3</sup> lays down the law thus: "Regularly [ \* 218 ] an infant under fourteen years is not to be \*examined upon his oath as a witness; but yet the condition of his person, as if he be intelligent, or the nature of the fact, may allow an examination of one under that age, as in case of witchcraft, an infant of nine years old has been allowed a witness against his own mother. And the like may be in a rape of one under ten years upon the stat. of 18 Eliz. c. 6. And the like hath been done in the case of buggery upon a boy upon the stat. 25 Hen. 8, c. 6. And surely in some cases one under the age of fourteen years, if otherwise of a competent discretion, may be a witness in case of treason." In another place, however,<sup>4</sup> after telling us that instances have been given of very young witnesses sworn in capital causes, viz., one of nine years old, he adds, "Yet such very young people under twelve years old I have not known examined upon oath, but sometimes the court for their information have heard their testimony without oath, which possibly being fortified with concurrent evidence may be of some weight, as in cases of rape, buggery, witchcraft, and such crimes, which are prac-

<sup>1</sup> Co. Litt. 6 b.

<sup>2</sup> Co. Litt. 247 b.

<sup>3</sup> 1 Hale, P. C. 302; see, also, Id. 634; and 2 Id. 279.

<sup>4</sup> 2 Hale, P. C. 283-4.



ticed upon children." In the case of *Young v. Slaughterford*,<sup>1</sup> T. T. 1709, which was an appeal of murder, tried at bar, L. C. J. Holt held that an infant under twelve years of age might be admitted as a witness if he knew the danger of an oath, and that appearing he was admitted. But in *R. v. Travers*,<sup>2</sup> at the Kingston Spring assizes of 1726, which was an indictment for a rape on a child under the age of seven years, L. C. B. Gilbert rejected the evidence of the child, and the prisoner was acquitted. A fresh indictment was then found for assault with intent to ravish, which was tried before L. C. J. Raymond. The child had in the mean time attained the age of seven, and on its evidence being objected to on the ground that a child six or seven years old ought for the purposes of testimony to be considered \*in the same light as a lunatic or madman, the counsel for the prosecution cited a case at the [ \* 219 ] Old Bailey, in 1698, where C. B. Ward admitted the evidence of a child under ten, which had been examined as to the nature of an oath and given a reasonable account of it. The Lord Chief Justice, however, rejected the evidence, and cited the case of one Steward, who was tried at the Old Bailey in 1704, for rapes on two children; in the first of which the child was ten years old, and yet was not admitted as a witness before other evidence was given of strong circumstances as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The second was between six and seven, and it was unanimously agreed that a child so young could not be admitted to be an evidence, and its testimony was accordingly rejected without inquiring into any circumstances to give it credit. Although L. C. B.

<sup>1</sup> 11 Mod. 228.<sup>2</sup> 1 Stra. 700.

Gilbert rejected the evidence of the child in the first case of *R. v. Travis*, it was probably on the ground that the child was ignorant of the nature of an oath, or deficient in natural intelligence; for in his *Treatise on Evidence*<sup>1</sup> he lays down the rule thus — “Children under the age of fourteen are not regularly admitted as witnesses, and yet at twelve they are obliged to swear allegiance in theleet. There is no time fixed wherein they are to be excluded from evidence, but the reason and sense of their evidence is to appear from the questions propounded to them, and their answers to them.” And, lastly, during the argument in the case of *Omychund v. Barker*,<sup>2</sup> in 1744, we find L. C. J. Lee informing counsel, who was relying on the language of Sir Matthew Hale in one of the passages above referred to, that it had been determined at the Old Bailey, upon mature consideration, that a child should not be admitted as an evidence without [ \* 220 ] <sup>\*oath</sup>; and L. C. B. Parker added, that it was so ruled at Kingston assizes before Lord Raymond.

### *Modern law.*

§ 154. Through all this inconsistency and confusion we can trace two principles working their way. 1. That if the testimony of an infant of tender years is to be received at all, it ought to be received from the infant itself, and not through a statement presented *obstetricante manu*. 2. That a witness being an infant of tender years is no ground for relaxing the rule “In judicio non creditur nisi juratis.”<sup>3</sup> At length, in 1779, both these received a solemn judicial recognition in *R. v.*

<sup>1</sup> Gilb. Ev. 144, 4th Ed.

<sup>2</sup> Cro. Car. 64.

<sup>3</sup> 1 Atk. 29.

*Brasier*,<sup>1</sup> which is the leading case on the subject. The prisoner was indicted for an assault with intent to commit a rape on an infant under the age of seven years, who was not examined as a witness, and the chief evidence for the prosecution was the account she had given of the transaction to two other persons. The prisoner having been convicted, the case was considered by the judges, who decided that the conviction was wrong. They held *unanimously* that "no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their \*answers to questions propounded to them by [ \* 221 ] the court; but if they are found incompetent to take an oath, their testimony cannot be received."

§ 155. *Brasier's* case is the foundation of the modern law and practice relative to the admissibility of the testimony of children. As in the criminal law "*malitia supplet ætatem*,"<sup>2</sup> so here we may say with the canonists "*prudencia supplet ætatem*."<sup>3</sup> Yet it appears that so late as

<sup>1</sup> 1 Leach, C. L. 199; 1 East, P. C. 443. It is to be remarked that a few years previous a similar opinion had been expressed by Gould, J., on an indictment for rape on an infant between six and seven years of age. The prisoner having been acquitted on the unsworn testimony of the child, the judge mentioned the matter to the other judges, a majority of whom agreed with him. *R. v. Powell*, 1 Leach's Crown Law, 110.

<sup>2</sup> Dy. 104 b; 1 Hale, P. C. 26; 4 Blackst. Comm. 23, and 212.

<sup>3</sup> Lancel. Inst. Jur. Can. lib. 2, tit. 10, § 5.

1808, on an indictment for a rape on a child of five years old, where the child was not examined, an account of what she had told her mother about three weeks after the transaction was received in evidence, and the prisoner convicted; but a case having been reserved, the judges, as might have been expected, thought the evidence clearly inadmissible, and he was pardoned. In a much more recent case,<sup>2</sup> Alderson, B., said, "It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge would allow him to be sworn." The judgment of Patteson, J., in *R. v. Williams*,<sup>3</sup> raises an important question as to the nature of the capacity required on these occasions. That was an indictment for murder, and a female child of eight years was called as a witness. It appeared that up to the death of the deceased the child had never heard of a God, or of a future state of rewards and punishments, never prayed, nor knew the nature of an oath; but that, since the death, she was visited by a clergyman twice, who had given her some instruction as to the nature and obligation of an oath; but she gave a very confused account of it, and had, says the report, [ \* 222 ] \* "no intelligence as to religion or a future state." Her testimony was objected to on the ground, that if it were sufficient that a witness should understand the nature of an oath merely from information recently communicated, a clergyman might always be called to instruct a witness on that subject when he came into the box to be examined on the trial. The counsel for the prosecution having cited *R. v. Wade*, 1 Moo. C. C. 86,

<sup>1</sup> *R. v. Tucker*, Ph. & Am. Ev. 6; 1 Ph. Ev. 10, 10th Ed.

<sup>2</sup> *R. v. Perkins*, 2 Moo. C. C. 139.

<sup>3</sup> 7 C. & P. 320.

Patteson, J., said, "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that, previous to the happening of the circumstances to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." There can be no doubt of the correctness of the decision in this case, nor that the circumstance that the child had been instructed in the nature of an oath after the offense was committed, is one for the judge to consider when called on to weigh its capacity to be sworn; but the dogma, if, indeed, Patteson, J., intended to lay it down, that the child must feel the binding obligation of an oath from the general course of its religious education previous to the injury done, is at variance with other authorities,<sup>1</sup> and is indefensible on principle.

*Examination of infants of tender years by the judge.*

§ 156. When a material witness in a criminal case is an infant of tender years, the judge usually examines him, with the view of ascertaining whether he is aware \*of the nature and obligation of an oath and the consequences of perjury. What shall be con- [ \* 223 ] sidered tender years for this purpose does not appear to be defined, although, by analogy to the general law re-

<sup>1</sup> See Tayl. Evid. § 1250, 5th Ed., and the cases there referred to. Also the cases cited *infra*.

specting infancy, the requisite degree of religious knowledge should be presumed at the age of fourteen. Still the court has a right to examine as to the religious knowledge even of an adult, if it suspects him deficient.<sup>1</sup> And if it is ascertained *before the trial* that a material witness is of tender years and devoid of religious knowledge, the court will, *in its discretion*, postpone the trial, and direct that he shall in the mean time receive due instruction on the subject.<sup>2</sup> But in a recent case, where a father was charged with violating his daughter, aged twelve, Alderson, B., refused to postpone the trial for the purpose of her being taught the nature of an oath; stating that all the judges were of opinion that it was an incorrect proceeding; that it was like preparing or getting up a witness for a particular purpose, and on that ground was very objectionable.<sup>3</sup> If this be correctly reported, not only is it at variance with a series of previous authorities,<sup>4</sup> but, as remarked in the text work where the case is found, "By the strict application of this rule, a parent, by neglecting his moral duty as to the education of his child, may thus obtain an immunity for the commission of a heinous crime."<sup>5</sup>

### *Dying declarations of infants.*

§ 157. On trials for homicide the general rule of law which rejects second-hand or hearsay evidence is relaxed, so far as to render admissible declarations of the deceased

<sup>1</sup> See *infra*.

<sup>2</sup> Stark. Ev. 117, 4th Ed.; 1 Phill. Ev. 9, 10th Ed.; Tayl. Ev. 1247, 5th. Ed.; 1 Leach C. L. 430, note (a); *R. v. Nicholas*, 2 Car. & K. 246; *R. v. Bayliss*, 4 Cox, Cr. Ca. 23.

<sup>3</sup> 1 Phill. Ev. 10, 10th Ed.

<sup>4</sup> See *supra*, note 2.

<sup>5</sup> 1 Phill. Ev. 10, note (3), 10th Ed.

as to the cause of his death, provided they \*were made by him at a time when he was under the [ \* 224 ] conviction that death was impending.<sup>1</sup> This exception has been allowed partly from necessity, partly on the ground that the situation of the party may fairly be taken, as conferring on what he says a religious sanction equal to that supplied by an oath, and partly that on such occasions witnesses rarely have any interest in deceiving. But as, when children of tender years are examined as witnesses, the court has the security of inquiring into their intelligence and religious knowledge, it seems to follow that their dying declarations are not *prima facie* receivable where those of an adult would be: for the latter will be rejected if it appears that the deceased was a person who, through ignorance or any other cause, was not likely to be impressed with a religious sense of his approaching dissolution.<sup>2</sup> In *R. v. Pike*,<sup>3</sup> two prisoners were indicted for the murder of a child *four* years old. It was proposed to put in evidence a statement made to her mother by the child shortly before her death, at a time when she thought she was dying, as to the manner in which she had been treated by the prisoners. Park, J. (with the concurrence of Parke, J.), rejected the statement, saying, "As this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. \* \* \* Indeed I think that from her age we must take it that she could not possibly have had any idea of that kind." Without in the least questioning the propriety of the *decision* in this case, we may well doubt whether

<sup>1</sup> See *infra*, bk. 3, pt. 2, ch. 4.

<sup>3</sup> 3 C. & P. 598.

<sup>2</sup> *Id.*

the above *dictum* can be supported. There certainly is no *præsumptio juris et de jure* on this subject; and however unlikely it may be that a child of four years old should have clear ideas respecting religion and divine [ \* 225 ] \*punishment for falsehood, yet if that fact were shown affirmatively, its dying declarations ought to be received. In *R. v. Perkins*,<sup>1</sup> it was held by the judges on a point reserved, that the dying declarations of a child of *ten* years old were receivable under such circumstances. But the question still remains, at what age is the presumption of the absence of intelligence and of ignorance on religious subjects to cease, so as to render this affirmative proof unnecessary? Analogy points to fourteen years, but judicial decisions are silent.

*Effect of the evidence of children.*

§ 158. As to the effect of the evidence of children when received, "Independently of the sanction of an oath," says a text work,<sup>2</sup> "the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; and what is wanted, in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive. It is clear that a person may be legally convicted upon such evidence alone and unsupported; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given." Quintilian<sup>3</sup> reckons among doubt-

<sup>1</sup> 2 Moo. C. C. 135.

<sup>3</sup> Inst. Orat. lib. 5, c. 7, *vers. fin.*

<sup>2</sup> Ph. & Am. Ev. 7.



ful proofs "parvulorum indicia; quos pars altera nihil fingere, altera nihil judicare dictura est." This must not, however, be taken too literally: some children indulge in habits of romancing, which often lead them to state as facts, circumstances having no existence but in their own imaginations; and the like consequence is not unfrequently induced in other children, by the suggestions or threats of grown-up persons acting on their fears and [ \* 226 ] unformed judgments. (a)

2°. *Incompetency from want of religion—Three forms of.*

§ 159. 2°. The next ground of incompetency may be styled "incompetency from want of religion." To the natural and moral sanctions of the truth of statements made by man to man, it has been usual in most, if not all, ages and countries to join the additional security of "An Oath;" *i. e.*, a recognition by the speaker of the presence of an invisible Being superior to man, ready and willing to punish any deviation from truth, invoking that Being to attest the truth of what is uttered, and in some cases calling down his vengeance in the event of falsehood.<sup>1</sup> On this principle courts of justice in most nations exact an oath as a condition precedent to the reception of evidence; and among us in particular, "In judicio non creditur nisi juratis," has been a legal maxim from the earliest time. Hence it follows that the evidence of a witness must be rejected who either is ignorant of, or who denies the existence of such a superior power, or

<sup>1</sup> See as to Oaths, Introd. pt. 2, §§ 56 *et seq.*

<sup>2</sup> Cro. Car. 64.

refuses to give the required security to the truth of his testimony; and the present source of incompetency may accordingly be divided into three heads: 1st. Want of religious knowledge; 2nd. Want of religious belief; and 3rd. Refusal to comply with religious forms.

1. *Want of religious knowledge.*

§ 160. The first of these may be disposed of in a word; the exception arising principally in the case of children, whose competency has already been considered.<sup>1</sup> But the same principles apply where an adult, deficient in the requisite religious knowledge, is offered as a witness.<sup>2</sup>

2. *Want of religious belief.*

[ \* 227 ] \* § 161. 2nd. Incompetency for want of religious belief. This has been in a great degree anticipated in a former part of this chapter,<sup>3</sup> where we took occasion to show the injustice and absurdity of the old practice, of inflicting incompetency as a punishment for erroneous opinions, or even for misconduct not likely to affect the veracity of a witness. The history of our law on this subject was there traced—the gradual establishment of the great and sound principles that courts of justice are not schools of theology—that the object of the law in requiring an oath is to get at the truth relative to the matters in dispute, by obtaining a hold on the *conscience* of the witness—and consequently that every person is admissible to give evidence who believes in a Divine Being, the avenger of falsehood and perjury among men, and who consents to invoke by some bind-

<sup>1</sup> *Suprà*, §§ 151 *et seq.*

<sup>2</sup> *R. v. White*, 1 Leach, C. L. 430; *R. v. Wade*, 1 Moo. C. C. 86.

<sup>3</sup> *Suprà*, §§ 134 *et seq.*

ing ceremony the attestation of that Power to the truth of his deposition. But how is the state of mind of the proposed witness on these subjects to be ascertained? It is clear that disbelief in the existence and moral government of God are not to be presumed;<sup>1</sup> if such exist they are psychological facts, and consequently incapable of proof except by the avowal of the party himself, or the presumption arising from circumstances.<sup>2</sup> (a) According to most of our text writers and the usual practice, the proper and regular mode of procedure is by examining the party himself;<sup>3</sup> while some authorities go so far as to assert that this is the only mode.<sup>4</sup> (b) Professor Christian, on the other hand, informs us, that he "heard a learned judge declare at nisi prius, that the judges had resolved not to permit \* adult witnesses to be interrogated respecting their belief [ \* 228 ] of the Deity and a future state;"<sup>5</sup> and adds, that "it is probably more conducive to the course of justice that

<sup>1</sup> 6 Co. 76 a., 1 Greenl. Ev. §§ 42, and 370, 7th Ed.

<sup>2</sup> Introd. pt. 1, § 12.

<sup>3</sup> Ph. & Am. Ev. 12; Rosc. Crim. Ev. 127, 4th Ed.; *The Queen's case*, 2 B. & B. 284; *R. v. Taylor*, 1 Peake, 11; *R. v. White*, 1 Leach, C. L. 430; *R. v. Serva*, 2 Car. & K. 56; see also 1 & 2 Vict. c. 105.

<sup>4</sup> Ph. & Am. Ev. 12; Rosc. Crim. Ev. 127, 4th Ed.

<sup>5</sup> 3 Carist. Blackst. 369, note 14.

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(a) The declarations of the party may be shown. *Smith v. Coffin*, 6 Shep. (Me.) 157; *State v. Townsend*, 2 Harr. (Del.) 543; *Halley v. Webster*, 8 Shep. (Me.) 461; *Arnold v. Arnold*, 13 Vt. 363; *Scott v. Hooper*, 14 id. 535.

(b) The rule is, that, when the witness has been proved incompetent by reason of disbelief in Deity, his competency cannot be restored by his own evidence. But an honest change of belief must be established by competent evidence. That is, such evidence as satisfies the court and the jury that the belief of the witness has really undergone an honest and essential change, so that, at the time when he is offered as a witness, he can fairly and honestly be said to be a believer in Deity. *Com. v. Wyman*, Thacher's Cr. Cas. 432. And the jury are to be the judges as to whether such change of belief has really been established. *Scott v. Hooper*, 14 Vt. 535.

this should be presumed till the contrary is proved. And the most religious witness may be scandalized by the imputation, which the very question conveys." This last is a strange argument; for the most respectable witness may be scandalized by *questions* imputing to him any possible form of crime, and yet such may be and frequently are put, and it is essential for the ends of justice that the right to put them should exist. Some of the American authorities adopt the conclusion of Professor Christian, but for different reasons. Witnesses, say they, are not allowed to be questioned as to their religious belief, not because it tends to disgrace them, but because it would be a personal scrutiny into the state of their faith and conscience, foreign to the spirit of free institutions, which oblige no man to avow his belief. Others of them, however, assign as the reason "that the witness could not be permitted in court to *explain* or *deny* the declarations imputed to him, because it would be *incongruous* to admit a man to his oath, for the purpose of ascertaining whether he had the necessary qualifications to be sworn."<sup>1</sup> But surely these views are extremes. On the one hand, if a witness may be questioned as to his religious opinions, it can only be on the assumption that a knowledge of them would in some way assist the tribunal, in which case they become facts in issue, and any legitimate evidence affecting them ought to be received. Very strong proof would doubtless be required, to induce a court to disbelieve the answers of a witness on these subjects—for the question is not what his religious opinions have been at any former period,

<sup>1</sup> 1 Greenl. Ev. § 370, note (2), 7th Ed.

<sup>2</sup> Appleton on Evid. pp. 26, 27.

\*but what they are at the moment when he is standing in the box. On the other hand, it is [ \* 229 ] an abuse of the great principles of civil and religious liberty to object to such an examination as inquisitorial. The object of it is not to pry into the speculative views of the witness, but to enable the tribunal to estimate his trustworthiness—in accordance with which it is fully established that he cannot be questioned as to any *particular* religious opinion, or even whether he believes in the Old or New Testament. No question can be asked beyond whether he believes in a God, the avenger of falsehood, and will designate a mode of swearing binding on his conscience;¹ and if he complies with these, he cannot be asked whether he considers any other mode *more* binding, for such a question is unnecessary and irrelevant.² And we apprehend that although these questions may be *put*, a witness, if he be an Athéist or a Theist, is not bound to *answer*; for by so doing he exposes himself to an indictment under the 9 & 10 Will. 3, c. 32, and perhaps also at common law; and it is an established principle that no man is bound to criminate himself.³(a)

¹ See the authorities cited *suprà*, §§ 134 *et seq.*

² So held by the judges in *The Queen's case*, 2 B. & B. 284.

³ *Suprà*, ch. 1, §§ 126 *et seq.*

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(a) Religious belief, or even the want of religion, is not now regarded as a test of the competency or incompetency of a witness. If a person takes upon himself the oath provided by law, or any oath which exposes him to the penalties of perjury if he swears falsely, it is regarded as sufficient, and it is held that, even where there is a statute which provides that religious belief shall go only to the credit of the witness, this does not justify asking a witness whether he believes in Christ as the Saviour. *Donkle v. Kohn*, 44 Ga. 266. And it was held in *Smith v. Coffin*, 6 Shep. (Me.) 157, that, even where the statute provided that belief in a Supreme Being was a prerequisite to the admission of a witness, after the witness had been admitted to testify, he could not be questioned as to his religious belief; but that his disbelief in a Supreme Being might be proved by his declarations, and that after his disbe-

§ 162. The ordinary form of swearing in English courts of common law is well known. The witness, holding the New Testament<sup>1</sup> in his bare right hand, is addressed by the officer of the court in a form, which varies according to the nature of the proceedings.

In criminal cases, when the accused is in custody, it runs thus:—

“The evidence that you shall give to the court and jury, sworn between our sovereign lady the Queen and  
[ \* 230 ] \*the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; So help you God.”

<sup>1</sup> Strictly speaking, this should be the four Evangelists; but the distinction is disregarded in practice.

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lief therein is thus established, he cannot qualify himself by swearing to his belief therein, unless he can show an honest change in his belief subsequent to such declarations, by competent witnesses. But his own assertion of such a change will not restore him to competency. *State v. Townsend*, 2 Harr. (Del.) 543; *Com. v. Wyman*, Thacher's Cr. Ca. 432; *Com. v. Batchelder*, id. 431. As to the admissibility of declarations of the witness to show his disbelief in a Supreme Being, see *Arnold v. Arnold*, 13 Vt. 363; *Scott v. Hooper*, 14 id. 535. Whether there has been an honest change of belief is a question of fact for the jury. *Arnold v. Arnold*, *ante*. The objection to a witness because of his disbelief in a Supreme Being must be taken before he is sworn, or it will be treated as waived. *People v. McGarven*, 17 Wend. (N. Y.) 460. A belief in future rewards and punishments is not essential; it is enough that the witness believes in a God. *Brock v. Milligan*, 10 Ohio, 121; *Cubbison v. McCreary*, 2 W. & S. (Penn.) 262; *Blacker v. Bruness*, 2 Ala. 354. But it is not profitable to pursue this inquiry further. In this country it is generally provided by statute that no person shall be disqualified as a witness by reason of religious belief, and where, as in some States, it is provided that disbelief in a Supreme Being may be given in evidence as affecting the credibility of the witness, evidence of that fact has little or no influence upon a jury. The real test of the degree of credence to be given to a witness, applied by courts and juries, when passing upon questions of fact, is the manner in which the testimony affects the mind. If it carries conviction of its truth, by reason of a thousand and one causes which cannot be defined, the evidence has effect, whatever may be the character of the witness, and if it does not, the character of the witness, his religious belief, nor any thing else can be of any avail with a jury, who are the final judges of the degree of credence to be given to any witness.

When the accused is not in custody the form is the same, except that he is then described as "the defendant."

In civil cases it is —

"The evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth: So help you God."

The witness then kisses the book.

But there can be little doubt that if a witness allows himself to be sworn in either of these forms, or perhaps in any other form, without objecting, he is liable to be indicted for perjury if his testimony prove false.<sup>1</sup>

§ 163. Numerous instances are to be found in our books, of the application of the principle that witnesses are to be sworn in that form which they consider binding on their consciences. Members of the Kirk of Scotland,<sup>2</sup> and others,<sup>3</sup> who object to kissing or touching the book, have been sworn by lifting up the hand while it lay open before them. In Ireland, Roman Catholics are (or at least were) sworn on a New Testament with a cross delineated on the cover.<sup>4</sup> Jews are sworn on the Pentateuch, keeping on their hats, the language of the oath being changed from "So help you God" to "So help you Jehovah." Moham-medans are sworn on the Koran, and the ceremony adopted in *R. v. Morgan*<sup>5</sup> is thus described. The book was produced. The witness first placed his right hand flat upon it, put the other hand to his forehead, and brought

<sup>1</sup> *Sells v. Hoare*, 3 B. & B. 232; 1 & 2 Vict. c. 105.

<sup>2</sup> *Mee v. Reid*, 1 Peake, 23.

<sup>3</sup> *Colt v. Dutton*, 2 Sid. 6; *Mildrone's case*, 1 Leach, C. L. 412; *Walker's case*, Id. 498.

<sup>4</sup> *Mac Nally*, Ev. 97.

<sup>5</sup> 1 Leach, C. L. 54.

the top of his forehead down to the book, and touched it with his head; he then looked for some time upon it; [ \* 231 ] \*and on being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. In a recent case a different course was followed. The officer of the court asked the witness what form of oath he deemed binding on his conscience, who replied, the oath in the usual words provided he were sworn on the Koran; and he was sworn accordingly. In another case a similar question was put to a Parsee witness, who was sworn in the same manner, except that instead of the Koran he was sworn on a book which he brought with him.<sup>1</sup> According to the report of *Omychund v. Barker*,<sup>2</sup> part of the ceremony of swearing a Hindoo consists in his touching the foot of a Bramin, or, if the party swearing be himself a priest, then the Bramin's hand; but, if this is deemed by their religion essential to the validity of an oath, it is obvious that Hindoos cannot be sworn in countries where no Bramins are to be found. This however appears not to be their only form of swearing;<sup>3</sup> and we understand that, in some parts of India at least, the natives are sworn on a portion of the water of the Ganges. A Chinese witness has been sworn thus.<sup>4</sup> On getting into the witness-box he knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The officer then administered the oath in these words, which were translated by the interpreter into the Chinese language. "You shall tell the truth and the

<sup>1</sup> These statements are made on the authority of the late Mr. Coleman, senior clerk to Pollock, C. B.

<sup>2</sup> 1 Atk. 21.

<sup>3</sup> Goodeve, Evid. 76, 77; 1 Stra. Hindù Law, 311.

<sup>4</sup> *R. v. Entrehman*, Car. & M. 248. See also Peake, Ev. 141, note (f), 5th Ed.



whole truth; the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer.”<sup>1</sup>

\* § 164. Whether this deference to the conscience of witnesses would be carried so far as [\* 232] to allow a form of oath involving rites which our usages would pronounce improper or indecent; as, for instance, the sacrifice of an animal, which was often resorted to in ancient, and occasionally even in modern times;<sup>2</sup> or the swearer placing his hand under the thigh of the person by whom the oath is administered, as was the custom of patriarchal times;<sup>3</sup> has not been settled by authority. The great question in all such cases would be, whether the ceremony suggested was *malum in se*, and the scruples of the witness against being sworn in any other way were expressed *bonâ fide*: or whether they were effected merely with the view of evading the obligation of an oath, or turning the administration of justice into ridicule.

§ 165. Atheism, and other forms of infidelity which deny all exercise of Divine power in rewarding truth and punishing falsehood, remained untouched by *Omychund v. Barker* and the above decisions, and continued to be recognized as grounds of incompetency.<sup>4</sup> But it was gravely questioned whether this state of the law

<sup>1</sup> According to a newspaper report, this form was followed at the Middlesex Sessions, April 2, 1855, in a case of *R. v. Sicho*, with the addition that the saucer was filled with salt.

<sup>2</sup> See Genes. xv. 9 *et seq.*; Grotius de Jur. Bell. ac Pac. lib. 2, c. 13, § 10; Liv. lib. 1, c. 24. It is said that in the island of Hong Kong, even since it came into the possession of the British, part of the ceremony of swearing a Chinese witness consisted in the cutting off the head of a live cock or fowl. Berncastle's Voyage to China, vol. 2, p. 39.

<sup>3</sup> Genesis, ch. xxiv. ver. 2; ch. xlvii. ver. 29.

<sup>4</sup> See *Maden v. Catanach*, 7. H. & N. 360.

ought to be maintained, at least so far as *casual* evidence was concerned? Was it wise to leave it in the power of every man whose breast was the repository, perhaps the sole repository, of evidence affecting the lives and fortunes of his fellow citizens, to stifle that evidence by pretending to hold erroneous views on the [ \* 233 ] \*subject of religion? And even supposing the Atheism, epicureanism, &c., to be ever so unfeigned and genuine, was it not more properly an objection to the *credit* than to the *competency* of the witness? — for it amounted simply to this, that out of *four* sanctions of truth *one* had no influence on his mind.<sup>1</sup> The only case, as had been well observed, in which “Cacothicism,” or bad religion, was a legitimate ground for the exclusion of testimony, was where a man belonged to a religion, the god of which ordained perjury;<sup>2</sup> and the fanatic whose creed allowed mendacity in private and false swearing in public,<sup>3</sup> was more dangerous in the

<sup>1</sup> 5 Benth. Jud. Ev. 125, 126. See, also, Introd. pt. 1, §§ 16 *et seq.*, and pt. 2, § 55.

<sup>2</sup> See Benth. Jud. Ev. bk. 9, pt. 3, ch. 5, s. 2.

<sup>3</sup> “Of all the religious codes known, the Hindoo is the only one by which, in the very text of it, if correctly reported, a license is in any instance expressly given to false testimony, delivered on a judicial occasion, or for a judicial purpose. \* \* \* Cases, some extra-judicial, some judicial, and upon the whole in considerable variety and to no inconsiderable extent, are specified, in which falsehood, false witness, false testimony, are expressly declared to be allowable. 1. False testimony of an exculpatory tendency, in behalf of a person accused of any offense punishable with death. Three cases, however, are excepted, viz. : 1. Where the offense consists in the murder of a Bramin; or 2. (what comes to the same thing) a cow; or 3. In the drinking of wine, the offender being, in this latter case, of the Bramin caste. \* \* \* In the representation of the other cases, scarce a word could be varied without danger of misrepresentation; word for word they stand as follows: ‘If a marriage for any person may be obtained by false witness, such falsehood may be told; as upon the day of celebrating the marriage, if on that day the marriage is liable to be incomplete, for want of giving certain articles, at that time, if three or four falsehoods be asserted, it does not signify; or if, on the day of marriage, a man

\*witness-box than any form of infidel that could present himself. Even Atheism, as was justly [ \* 234 ] remarked by Lord Bacon,<sup>1</sup> "leaves a man to sense, to philosophy, to natural piety, to laws, to reputation: all which may be guides to an outward moral virtue, though religion were not; but superstition dismounts all these, and erecteth an absolute monarchy in the minds of men." And, whatever might have been urged formerly in favor of the exclusion in question, it seemed inconsistent to retain at the present day; since the 6 & 7 Vict. c. 22 had allowed the reception, in the British colonies, of the unsworn testimony of the members of certain barbarous and uncivilized races, who are described in that statute (whether truly or not is immaterial to our present purpose) as "destitute of the knowledge of God and of any religious belief." A similar change in the law on this subject had been effected by the recent legislation of

promises to give his daughter many ornaments, and is not able to give them, such falsehoods as these, if told to promote a marriage, are allowable. If a man, by the impulse of lust, tells lies to a woman, or if his own life would otherwise be lost, or all the goods of his house spoiled, or if it is for the benefit of a Bramin, in such affairs falsehood is allowable.'" Benth. Jud. Ev. vol. i. pp. 235, 236. See, also, vol. v. p. 134. We have verified his reference for these extraordinary statements. The above passages will be found in the translation of Pootee, ch. 3, s. 9, in Halhed's Code of Gentoo Laws. See further on this subject, Goodeve, Evid. 114, 115, and the Ordinances of Menu, ch. 8, § 112 translated by Sir Wm. Jones. The lower orders of Irish, although timorous of taking even true oaths in general, commonly consider perjury to save a criminal from capital punishment either as no crime at all, or at most a peccadillo. To these instances may be added the principle laid down by Mascardus relative to confessions to clergymen, who, not satisfied with contending that such confessions ought to be inviolable, goes on to say that if the priest be examined as a witness to prove what was stated to him in confession, "*potest dicere se nihil scire, ex eo quod illud, quod scit, scit ut Deus, et ut Deus non producitur in testimonium, sed ut homo, et tanquam homo ignorat illud, super quo producitur*:" Mascardus, de Prob. Quæst. 5, NN. 50, 51; 1 Greenl. Ev. § 247, 7th Ed.

<sup>1</sup> Bacon's Essay on Superstition.

some of the United States of America, whereby the want of religious belief was treated as an objection to the *credit* not to the *competency* of a witness.<sup>1</sup> And, as we shall see presently, our own legislature has at length adopted these views.<sup>2</sup>

### 3. *Refusal to comply with religious forms.*

[ \* 235 ] \*§ 166. The third ground remains to be noticed, namely, the refusal by the person called as a witness, to comply with religious forms,—in other words, to guarantee the truth of his testimony by the sanction of an oath in any shape. A perverse refusal to be sworn was treated as a contempt of court; but great difficulty had arisen in modern times from the circumstance that several sects of Christians, and individual members of other sects, entertained conscientious objections to the use of oaths; relying on the command in the New Testament, “Swear not at all.”<sup>3</sup> In some instances

<sup>1</sup> Appleton, Evid., App. 272, 277, 278.

<sup>2</sup> See 32 & 33 Vict. c. 68, s. 4.

<sup>3</sup> Matt. v. 34. In the original “*μη δμόσαι ὅλως*,” in the Vulgate “non jurare omnino;” and the prohibition is repeated James, v. 12. Most Christians consider that these words are only to be understood with reference to profane, rash, and perhaps evasive swearing, and were not at all intended to prohibit oaths taken according to the teaching of the Old Testament, “in truth, in judgment, and in righteousness.” Jerem. iv. 2. The discourse contained in Matt. v., commonly called the Sermon on the Mount, of which the above passage forms part, is directed generally against abuses and evasions of the moral law; all intention of revoking any part of which is expressly disclaimed: ver. 17. Thus with respect to the subject in question: the Jews were commanded to swear by the name of God, Deut. vi. 13, and were told that they must not forswear themselves, Lev. xix. 12. Now, the Sermon on the Mount does not abrogate this, but on the contrary, proceeds to show that swearing by created things is in effect swearing by the Creator of them. Matt. v. ver. 33 *et seq.*, “Ye have heard that it hath been said by them” (qu. to them? “*ἐβρέθη τοῖς ἀρχαίοις*”) “of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God’s throne; nor by the earth; for it is his footstool: neither by

\*the legislature, satisfied that these scruples were *bonâ fide*, judiciously gave way to them, [ \* 236 ] and interposed for the relief of the parties, by substituting for an oath a solemn affirmation or declaration, rendering, however, a false affirmation or declaration punishable as perjury. The statutes on this subject extended to Quakers,<sup>1</sup> Moravians,<sup>2</sup> and Separatists;<sup>3</sup> as also to persons who had been Quakers or Moravians, but though ceasing to be such continued to object conscientiously to taking oaths.<sup>4</sup> The difference in the forms of affirmation given by these statutes is singular. In the case of Quakers and Moravians it runs thus :

Jerusalem ; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea ; Nay, nay : for whatsoever is more than these cometh of evil." This seems confirmed by a subsequent passage of the same gospel, Matt. xxiii. 16 *et seq.*, where our Lord addresses the scribes and Pharisees thus : " Woe unto you, ye blind guides, which say, Whosoever shall swear by the temple, it is nothing ; but whosoever shall swear by the gold of the temple, he is a debtor. Ye fools and blind ; for whether is greater, the gold, or the temple that sanctifieth the gold ? And, whosoever shall swear by the altar it is nothing ; but whosoever sweareth by the gift that is upon it, he is guilty. Ye fools, and blind ; for whether is greater, the gift, or the altar that sanctifieth the gift ? Whoso therefore shall swear by the altar, sweareth by it, and by all things thereon. And whoso shall swear by the temple, sweareth by it, and by him that dwelleth therein. And he that shall swear by heaven, sweareth by the throne of God, and by him that sitteth thereon." One thing, however, is certain, that if the words " Swear not at all " are to be understood as an absolute prohibition of calling God to witness under *any* circumstances, the Apostle Paul has most unequivocally violated this command in several of his epistles ; as, for instance, " Now the things which I write unto you, behold, *before God*, I lie not," Gal. i. 20. " *God is my witness*, whom I serve, &c.," Rom. i. 9. " I call God for a record upon my soul," 2 Cor. i. 23. See also 2 Cor. xi. 31 ; 1 Thes. ii. 5 ; Phillip. i. 8. In the Epistle to the Hebrews, vi. 16, 17 — also, he says, " For men verily swear by the greater ; and an oath for confirmation is to them an end of all strife," and refers to the oath taken by God himself to Abraham, ver. 13-17.

<sup>1</sup> 3 & 4 Will. 4, c. 49.

<sup>2</sup> Id.

<sup>3</sup> 3 & 4 Will. 4, c. 82.

<sup>4</sup> 1 & 2 Vict. c. 77.

"I *A. B.* being one of the people called Quakers [*or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians, as the case may be*] do solemnly, sincerely, and truly declare and affirm," &c.

With the Separatists it is :

"I *A. B.* do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare that I [*\* 237*] \* am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect ; and I do also in the same solemn manner affirm and declare," &c.

In the two remaining cases the form is :

"I *A. B.* having been one of the people called Quakers (*or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians, as the case may be*), and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm."

Members of other Christian sects, the tenets of which recognized the lawfulness of oaths, were still compellable to be sworn in criminal cases ; but with respect to civil cases, it was enacted by the 17 & 18 Vict. c. 125, s. 20, that "If any person called as a witness, &c., shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge or other presiding officer, &c., upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, viz. :

"I *A. B.* do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my

religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare,' " &c.

This enactment was extended to criminal cases by 24 & 25 Vict. c. 66

And now the whole subject is regulated by the 32 & 33 Vict. c. 68, s. 4, which applies to *every* "person called to give evidence in any court of justice, whether in a civil or criminal proceeding," who "shall object to take an oath, or shall be objected to as incompetent to take an oath;" and which enacts, that "such person shall, if the presiding judge is satisfied \*that the taking of an oath would have no binding effect on his conscience, [ \* 238 ] make the following promise and declaration :

"I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.'"

And that "any person who, having made such promise and declaration, shall willfully and corruptly give false evidence shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath."

### 3°. *Incompetency from interest.*

§ 167. 3°. Incompetency from interest. The 6 & 7 Vict. c. 85, abolishing incompetency in witnesses, on the ground of their interest in the matter in question, has been already referred to.<sup>1</sup> And although, by the operation of that and subsequent enactments, competency may now be looked on as the rule and incompetency the exception, still it will be advisable to treat the whole subject of incompetency from interest as it existed at the common law, and then point out the extent to which it has been modified by statute.

<sup>1</sup> *Supra*, § 143.

1. *Parties to the suit — General rule of the old law — not competent.*

§ 168. First, then, of the parties to the suit. “*Nemo in propriâ causâ testis, esse debet,*”<sup>1</sup> was the rule of the old law—a rule, according to the best authorities, founded *solely* on the interest which the parties to the suit were supposed to have in the event of it.<sup>2</sup> Consequently, when it appeared that they had none, or that any which they ever had had been removed, their evidence was receivable: as, for instance, where one of several defendants suffered judgment by default; or had a *nolle prosequi* entered against him, under circumstances \*which rendered him indifferent to the [ \* 239 ] result of the contest between his companions and the plaintiff, &c. So, if the name of a party appearing on the record as a defendant were conclusively to exclude him from being a witness, a prosecutor or plaintiff might in many cases obtain an unjust verdict, by making defendants of all the witnesses who could give evidence in favor of his real adversary.<sup>3</sup> When, therefore, the court saw that there was no evidence against some of several defendants, it would, *in its discretion*, direct a verdict to be taken for them before the others were called on for their defense.<sup>4</sup> And a like practice

<sup>1</sup> 1 Blackst. Com. 443; 3 Id. 371. See also Co. Litt. 6 b. It was the same in the civil law: see Dig. lib. 22, tit. 5, l. 10; Cod. lib. 4, tit. 20, l. 10; Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 6.

<sup>2</sup> Gilb. Ev. 180, 4th Ed.; Ph. & Am. Ev. 47; *Worrall v. Jones*, 7 Bingh. 395; *Pipe v. Steel*, 2 Q. B. 733.

<sup>3</sup> 12 Ass. pl. 11 & 12; *Dymoke's case*, Sav. 34, pl. 81; *Neilau v. Hanny*, 2 Car. & K. 710.

<sup>4</sup> *Creswick's case*, Clayt. 37, pl. 64; *Anon.*, 1 Mod. 11, pl. 34; *White v. Hill*, 6 Q. B. 487; *Wakeman v. Lindsey*, 14 Q. B. 625; and the authorities in the preceding note.



was followed, where the evidence of a person whose name appeared on the record as defendant was required by the plaintiff or the crown.

*Exceptions — At common law — Prosecutors.*

§ 169. There were several common-law exceptions to this part of the rule in question. The first which we shall notice was perhaps more apparent than real, viz., that the prosecutor of an indictment or information is in general a competent witness against the accused.<sup>1</sup> The reason of this is, that in contemplation of law the suit is the suit of the crown, instituted not to redress the injury done to the person by whom the law is set in motion, but to punish the offender for disturbing the peace of the sovereign and the good order of society. And hence the appellor in an *appeal* of felony, while that mode of proceeding was in use, was not a competent witness against the appellee; for the suit was his own.<sup>2</sup> The prosecutor of an indictment, &c., has not in general any direct pecuniary interest in the result; \*for although under certain statutes he may be awarded his costs, [\* 240] yet this is discretionary with the judge, and does not flow as a necessary consequence from a verdict of conviction. "But," as observed in a text work published before the passing of the 6 & 7 Vict. c. 85,<sup>3</sup> "although, in general, a prosecutor or party aggrieved has no interest in the event of a prosecution, and is therefore a competent witness, there are several classes of cases in which, by virtue of some legislative enactment, he is entitled to a particular benefit or advantage upon obtaining a conviction of

<sup>1</sup> "A doner evidence, chescun serra admitte pur le roy." Staundf. P. C. lib. 8, c. 8. 163 a.

<sup>2</sup> 2 Hale, P. C. 281, 282.

<sup>3</sup> Ph. & Am. Ev. 66.

the party accused. In these cases, where the benefit or advantage will immediately result to the witness on a conviction being obtained, the witness will be interested, and he will be incompetent, unless the general rule of law be dispensed with in the particular case, either by some legislative enactment, or some principle of public policy requiring that his evidence shall be received." The most important instance of this latter exception is in the case of prosecutions for robbery or theft, where the party injured was competent, notwithstanding he became entitled to a restitution of his property immediately upon obtaining a conviction of the offender.<sup>1</sup>

*Approvers and accomplices.*

§ 170. A striking exception to the common-law rule, which excluded the evidence of parties interested in the event of a suit, or question at issue, is to be found in the old system of allowing persons indicted for treason or felony to become *approvers*, which has been replaced by the modern one of receiving the evidence of *accomplices*, — the "*socii vel auxiliatores criminis*" of the civilians. The necessity for admitting this kind of evidence has been recognized by the laws of all countries, and the practice is of extreme antiquity in our own.<sup>2</sup> The

[ \* 241 ] \*reasons for it were thus explained by a very able judge, on an important occasion: "If it should ever be laid down as a practical rule in the administration of justice, that the testimony of accomplices should be rejected as incredible, the most mischievous

<sup>1</sup> Id. 67.

<sup>2</sup> Approvers are mentioned in the ancient treatise entitled "*Dialogus de Scaccario*," p. 426. See also 12 Edw. IV. 10 B. pl. 26; 2 Hen. VII. 3 A. pl. 8.

<sup>3</sup> L. C. J. Abbott's Charge to the Grand Jury on the Special Commission in March, 1820; 33 Ho. St. Tr. 689.

consequences must necessarily ensue ; because it must not only happen that many heinous crimes and offenses will pass unpunished, but great encouragement will be given to bad men, by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt, and thereby universal confidence will be substituted for that distrust of each other, which naturally possesses men engaged in wicked purposes, and which operates as one of the most effectual restraints against the commission of those crimes, to which the concurrence of several persons is required. No such rule is laid down by the law of England or of any other country." At first sight it might seem that, previous to the 6 & 7 Vict. c. 85, the objection to the testimony of such persons would have been properly ranged under infamy of character: but as objections of that nature could only be supported by proof of a conviction for an offense, and judgment of the court thereon,<sup>1</sup> it followed that a confession, by a witness, of any conduct, however infamous, only went to his credit, so that the true ground of objection to the evidence of approvers or accomplices, arises from the obvious interest which they have to save themselves from punishment by the conviction of the accused against whom they appear. The old law of approvement, and the modern practice of admitting the evidence of accomplices, are thus fully and clearly stated by Lord Mansfield in *R. v. Rudd*.<sup>2</sup> "The law of approvement, in analogy to which this other practice" (*i. e.*, of receiving the evidence of accomplices) \* "has been adopted, and so modeled as [ \* 242 ] to be received with more latitude, is still in force, and is very material. A person desiring to be an ap-

<sup>1</sup> *Suprà*, § 142.

<sup>2</sup> Cowp. 331, 335.

prover, must be one *indicted* of the offense, and *in custody* on that indictment: he must confess himself guilty of the offense, and *desire* to accuse his accomplices: he must likewise upon oath discover, not only the particular offense for which he is indicted, but all *treasons* and *felonies* which he *knows of*; and after all this, it is in the discretion of the court, whether they will assign him a coroner, and admit him to be an approver or not: for if, on his confession, it appears that he is a *principal* and tempted the others, the court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true; and that he has discovered the *whole truth*. For this purpose, the coroner puts his appeal into form; and when the prisoner returns into court, he must repeat his appeal, without any help from the court, or from any bystander. And the law is so nice that if he *vary* in a *single circumstance* the whole falls to the ground, and he is condemned to be hanged; if he fail in the color of a horse, or in circumstances of time, so rigorous is the law that he is condemned to be hanged; much more, if he fail in essentials. The same consequences follow if he does not discover *the whole truth*: and in all these cases the approver is convicted on his own confession. See this doctrine more at large in Hale's Pleas of the Crown, vol. 2, p. 226 to 236; Staund. Pl. Crown, lib. 2, c. 52 to c. 58; 3 Inst. 129. A further rigorous circumstance is, that it is necessary to the approver's own safety that the jury should believe him: for if the partners in his crime are not convicted, the approver himself is executed. Great inconvenience arose out of this practice of approvement. No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders, that accomplices

\* should be received as witnesses, the practice is liable to many objections. And though, [ \* 243 ] under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with the jury to convict the offenders ; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself. Let us see what has come in the room of this practice of approvement. A kind of *hope*, that accomplices who behave fairly and disclose the whole truth, and bring others to justice, should themselves escape punishment, and be pardoned. This is in the nature of a recommendation to mercy. \* \* \* The accomplice is not assured of his pardon ; but gives his evidence *in vinculis*, in custody : and it depends on the title he has from his behavior, whether he shall be pardoned or executed."

§ 171. But although in strictness a jury may legally (except where two witnesses are required by law) convict on the unsupported evidence of an accomplice or *socius criminis*,<sup>1</sup> yet a judicious practice has grown up, now so generally followed as almost to have the force of law, by which judges always advise juries to require such evidence to be corroborated in some material part by untainted testimony. It is not, however, every participation in a crime which will render a party an accomplice in it so as to require his evidence to be confirmed.<sup>2</sup> The nature of the confirmation in each case must of course depend very considerably on its peculiar circumstances ; but a few general principles may be stated. First, then, it is not necessary that the story told by the accomplice

<sup>1</sup> See the authorities collected *suprà*, § 139, p. 256, note 1. For the practice of the civil law on this subject, see Mascard. de Prob. Concl. 158.

<sup>2</sup> *R. v. Hargrave*, 5 Car. & P. 170 ; *R. v. Jarvis*, 2 Moo. & R. 40.

should be corroborated in every circumstance he details in evidence: for, if so, the \*calling him as a [ \* 244 ] witness might be dispensed with altogether.<sup>1</sup> Again, notwithstanding some old cases to the contrary, it seems now settled that the corroboration should not be merely as to the *corpus delicti*, but should go to some circumstances affecting the identity of the accused as participating in the transaction.<sup>2</sup> "A man," says Lord Abinger, "who has been guilty of a crime himself will always be able to relate the facts of the case; and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all."<sup>3</sup> It is thought that confirmatory evidence by the wife of an accomplice will not suffice, for they must for this purpose be considered as one person.<sup>4</sup> Neither ought the jury to be satisfied merely with the evidence of several accomplices who corroborate each other.<sup>5</sup> (a)

<sup>1</sup> 31 Ho. St. Tr. 980.

<sup>2</sup> *R. v. Farler*, 8 C. & P. 106; *R. v. Addis*, 6 C. & P. 388; *R. v. Webb*, Id. 595; *R. v. Wilkes*, 7 C. & P. 272; *R. v. Moores*, Id. 270; *R. v. Dyke*, 8 C. & P. 261; *R. v. Stubbs*, 1 Dears. C. C. 555.

<sup>3</sup> *R. v. Farier*, 8 C. & P. 108. Similar language was used by Parke, B., in *R. v. Parker*, Kent Sp. Ass. 1851, MS.

<sup>4</sup> *R. v. Neal*, 7 C. & P. 168.

<sup>5</sup> 31 Ho. St. Tr. 1122-3; *R. v. Noakes*, 5 C. & P. 326; *R. v. Magill*, Ir. Circ. Rep. 418.

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(a) The evidence of an accomplice is now generally regarded as sufficient, even though not corroborated, to uphold a conviction. Such evidence should be weighed carefully, and it is always competent to show the motives which actuate the witness, as malice, interest and hope, or promise of immunity from punishment himself. Yet, if the evidence is such as convinces the jury of its truth, a conviction predicated upon that alone will be upheld; *Com. v. Brooks*, 9 Gray (Mass.), 299; *Com. v. Putnam*, 2 Allen (Mass.), 301; *State v. Stebbins*, 29 Conn. 463; *State v. Watson*, 31 Mo. 361; *State v. Litchfield*, 58 Me. 267; *Gray v. People*, 26 Ill. 344; *Phillips v. State*, 34 Ga. 502; *Sumter v. State*, 11 Fla. 247; *McKenzie v. State*, 24 Ark. 636; *Frazer v. People*, 54 Barb. (N. Y.) 306; *People v. Haynes*, 53 id. 450; *State v. Cook*, 20 La. Ann.

*Issues from Chancery.*

§ 172. When an issue was directed from the Court of Chancery to be tried in a court of law, it was frequently made part of the order that the plaintiff or defendant

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145, *United States v. Smith*, 2 Bond (U. S.), 899; *Parsons v. State*, 43 Ga. 197; but a liberal and full cross-examination is permitted. *Lee v. State*, 21 Ohio St. 151.

In California and Texas under the Code, the uncorroborated evidence of an accomplice is not sufficient, but *slight* corroboration only is required; *People v. Melvane*, 39 Cal. 614, and from the language of the cases it is evident that, except for the statute, the court would allow convictions on the uncorroborated evidence of an associate in the crime.

The rule that the evidence of an accomplice requires corroboration is not a rule of law, but rather one of practice to be applied in the discretion of the court. *Regina v. Boyes*, 1 E. B. & S. 311; *State v. Potter*, 42 Vt. 495; *Royal Ins. Co. v. Noble*, 5 Abb. (N. Y.) N. S. 54; *Haskins v. People*, 16 N. Y. 344; *People v. Haynes*, 55 Barb. (N. Y.) 450; *Fraser v. People*, 54 id. 306. In *People v. Davis*, 21 Wend. (N. Y.) 308, the court say, "There is no inflexible rule of law, that no person shall be convicted on the testimony of an accomplice unless his evidence is corroborated by other testimony. It is for the jury to pass upon the credibility of the testimony of an accomplice, as upon the testimony of any other witness."

The court should advise caution on the part of the jury, where the prosecution depends upon the uncorroborated evidence of an accomplice; but they are not to be instructed, as a matter of law, that the prisoner must be acquitted in such cases. An accomplice is a competent witness, and if credit is given to his evidence, it requires no confirmation."

Lord Denman, C. J., in *Rex v. Hastings*, 7 C. & P. 152, in passing upon this question said, "I consider, and I believe my learned brothers agree with me, that it is altogether for the jury, and they may, if they please, act upon the evidence of an accomplice without any confirmation of his statement. *But one would not, of course, be inclined to give any great degree of credit to a person so situated.*"

See opinion of Grose, J., in *Jordaine v. Lashbrooke*, 7 D. & E. 610, where he comments not only upon the necessity, but also the antiquity of the rule admitting the evidence of accomplices, and permitting the jury to judge of the weight to be given it. See, also, *Hale's Pleas of the Crown*, 303-305.

There has been considerable conflict of authority upon this question, both in this country and England; but it is now the general practice in the courts of both countries to leave the whole question of the degree of credit to be given to such evidence, whether corroborated or not, to the jury, under proper instructions from the court, and it is the duty of the court, even without any

should be examined as a witness. So when a cause was referred to arbitration from a court of law, it was usually part of the rule that the arbitrator should be at liberty to examine the parties.

*By statute.*

§ 173. The first general statutory exception to the rule against admitting parties to the suit as witnesses was contained in the 9 & 10 Vict. c. 95. That statute, after remodeling the County Courts, and extending their jurisdiction, enacts in its 83rd section that "On the hearing or trial of any action or on any other [ \* 245 ] \*proceeding under this act, the parties thereto, their wives, and all other persons, may be examined, either on behalf of the plaintiff or defendant, upon oath, or solemn affirmation in those cases in which

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request from the defendant, to instruct the jury to weigh such evidence with great caution. See *People v. Haskins*, 16 N. Y. 344; *People v. Costello*, 1 Denio (N. Y.), 83; *Wills v. People*, 1 Parker's Cr. (N. Y.) 473; *People v. Davis*, 21 Wend. (N. Y.) 308. See, also, opinion of Lord Ellenborough, in *Rex v. Jones*, 2 Camp. 132, 133; also *Atwood's Case*, 2 Leach's Cr. Cas. 521; and *Durham's Case*, id 538; *People v. Doyle*, 21 N. Y. 578; *People v. Coats*, 4 Parker's Cr. (N. Y.) 663; *Gray v. People*, 26 Ill. 344.

The rule in reference to such evidence is, that it is always to be regarded with suspicion, and should be carefully scrutinized by the jury, and it is error for the court not to caution the jury in reference to such evidence. But if, under proper instructions from the court, the jury are convinced of its truth, they may properly predicate a conviction thereon. *State v. Stebbins*, *ante*; *State v. Watson*, *ante*; *State v. Cook*, 20 La. Ann. 145.

Even though it is shown that the witness is influenced by malice, yet the jury may weigh the evidence and give it such credence as they deem it entitled to, and the court are not bound to instruct them to disregard it; *Com. v. Putnam*, *ante*; and so too an accomplice is a competent witness in a civil action to recover damages for the alleged criminal act. *Sinclair v. Jackson*, 47 Me. 102. When an accomplice is permitted to testify, his connection with the crime goes to his credibility, but he cannot be questioned as to his connection with other crimes, for the purpose of destroying or injuring his credibility. *Pitcher v. People*, 16 Mich. 142; *State v. Cook*, 20 La. Ann. 145.



persons are by law allowed to make affirmation instead of taking an oath, to be administered by the proper officer of the court." But this must not be looked on as an innovation introduced for the first time; for the old Courts of Conscience and Courts of Requests acts contained similar provisions.

§ 174. Several other exceptions to the rule excluding the evidence of parties to a suit or proceeding were introduced by modern statutes: until the term "Incompetency of Parties" was almost abolished by the 14 & 15 Vict. c. 99. That statute, after in its first section repealing the proviso in the first section of the 6 & 7 Vict. c. 85, which retained the exclusion of the evidence of such parties, enacted as follows:

Sect. 2. "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

Sect. 3. "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offense, or any offense punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to

[ \* 246 ] \*answer any question tending to criminate himself or herself, &c.”

Sect. 4. “Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery; or to any action for breach of promise of marriage.”<sup>1</sup>

The 5th sect. provided that nothing in the act contained should repeal any provision in the Wills Act, 7 Will. 4 & 1 Vict. c. 26.

## 2. *Husbands and wives of the parties to the suit — General rule of the old law ; not competent.*

§ 175. The other persons affected by this rule of exclusion were the husbands and wives of the parties to the suit or proceeding. Husband and wife, say our books, “sunt duæ animæ in carne unâ;” they “are considered as one and the same person in law, and to have the same affections and interests; from whence it has been established, as a general rule, that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case.”<sup>2</sup> This rule was not limited to protecting from disclosure matters communicated in nuptial confidence, or facts the knowledge of which had been acquired in consequence of the relation of husband

<sup>1</sup> Repealed by the 32 & 33 Vict. c. 68, s. 1. See *infra*, § 180.

<sup>2</sup> Co. Litt. 6 b. See also Litt. sect. 291; Co. Litt. 112 a, and 123 a.

<sup>3</sup> Bac. Ab. Evidence, A. 1. See also 2 Hawk. P. C. c. 46, sect. 16; *Davis v. Dinwoody*, 4 T. R. 678; *Hawkesworth v. Showler*, 12 M. & W. 45; *O'Connor v. Majoribanks*, 4 M. & Gr. 435; *Barbat v. Allen*, 7 Exch. 609.

and wife; but was an absolute prohibition of the testimony of the witness to any facts affecting the husband or wife, as the case might be, however the knowledge of those facts might have been acquired. But the rule \*only applied where the husband or wife was party to the suit in which the other was called [ \* 247 ] as a witness, and did not extend to collateral proceedings between third parties. In such cases husband and wife might be examined as witnesses, although the testimony of the one tended to confirm or contradict that of the other.<sup>1</sup> And the declarations of a wife, acting as the lawfully constituted agent of her husband, were admissible against him like the declarations of any other lawfully constituted agent.<sup>2</sup> (a)

*Exceptions—At common law—Charges of personal injury—Abduction.*

§ 176. To this branch also common-law exceptions are not wanting. Where one of the married parties used or

<sup>1</sup> 1 Phill. Ev. 72, 10th Ed.; Tayl. Ev. 1235, 4th Ed.

<sup>2</sup> 1 Phill. Ev. 78 *et seq.*, 10th Ed.

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(a) In collateral proceedings, or in suits between third persons, the husband and wife may be witnesses against each other, and may even be used to impeach each other. *Com. v. Reid*, 8 Phila. (Penn.) 385; *Ware v. State*, 35 N. J. 553; *State v. Wilson*, 2 Vroom (N. J.), 77; *Stewart v. Johnson*, 3 Harr. (N. J.) 87; *Buller's Nisi Prius*, 287; *Williams v. Johnson*, 1 Str. 504; *Mayness v. Walker*, 26 Ark. 47; *Littlefield v. Rice*, 10 Metc. (Mass.) 287; *Anderson v. Sanderson*, 2 Starkie, 204; *Emerson v. Blonden*, 1 Esp. 141. And her declarations under such circumstances are sufficient even to take a case out of the statute of limitations. *Anderson v. Sanderson, ante*. A wife's dying declarations may be used against the husband in a prosecution for her murder. *Pennsylvania v. Stoops, Addis*. (Penn.) 381; *John's Case*, 1 East, P. C. 357; *Woodcock's Case*, 2 Leach's Cr. Cas. 563. So she may be used as a witness against one accused of producing an abortion on her at the procurement of her husband; *State v. Briggs*, 9 R. I. 361; even though her husband is a party to the indictment; *State v. Dyer*, 59 Me. 303.

threatened personal violence to the other, the law would not allow the supposed unity of person in husband and wife to supersede the more important principle that the state is bound to protect the lives and limbs of its citizens.<sup>1</sup> Thus, on an indictment against a man for assault and battery of his wife, or vice versâ, the injured party is a competent witness;<sup>2</sup> and husband and wife may swear the peace against each other.<sup>3</sup> So a husband may be principal in a second degree to a rape on his wife, and she is a competent witness against him;<sup>4</sup> but principal in the first degree he cannot be, for obvious reasons.<sup>5</sup> So if a husband commits an unnatural offense with his wife, she is a competent witness against him.<sup>6</sup> The case of abduction also falls within this exception. On indictments

[ \* 248 ] \*under the repealed stat. 3 Hen. 7, c. 2, for forcibly taking away a woman, the female, though married to the offending party, was a competent witness against him; the reasons assigned for which by Mr. Justice Blackstone<sup>7</sup> are, that "in this case she can with no propriety be reckoned his wife, because a main ingredient, her consent, was wanting to the contract; and also there is another maxim of law, that no man shall take advantage of his own wrong, which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness to

<sup>1</sup> 2 Hawk. P. C. c. 46, s. 16; Peake's Ev. 173, 5th Ed.; 1 East, P. C. 455; B. N. P. 287; 1 Phill. Ev. 80, 10th Ed.

<sup>2</sup> B. N. P. 287; *R. v. Azire*, 1 Str. 633.

<sup>3</sup> *Anon.*, 12 Mod. 454; B. N. P. 287.

<sup>4</sup> 1 Phill. Ev. 80, 10th Ed.; 2 Hawk. P. C. c. 46, s. 16; *Lord Audley's case*, 3 Ho. St. Tr. 402, 413; Hutt. 115, 116.

<sup>5</sup> 1 Hale, P. C. 629.

<sup>6</sup> *R. v. Jellyman*, 8 C. & P. 604.

<sup>7</sup> 1 Blackst. Comm. 443. See *Swendson's case*, 14 Ho. St. Tr. 559, 575; and per Abbott, C. J., in *R. v. Serjeant*, Ry. & Mo. 352.

that very fact." This statute was replaced by the 9 Geo. 4, c. 31, s. 19, which was in its turn repealed by 24 & 25 Vict. c. 95, and its provisions re-enacted, with a few alterations, by 24 & 25 Vict. c. 100. Sect. 53 enacts, "where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, &c." And by sect. 54, "whosoever shall, by force, take away or detain against her will any woman of any age, with intent to marry or carnally know her, or to cause her to \*be married or carnally known by any other person, shall be guilty of felony, &c." The [ \* 249 ] female so taken away is a competent witness on an indictment under these statutes; and it is said she is so, notwithstanding her subsequent assent to the marriage, and voluntary cohabitation.<sup>1</sup>

<sup>1</sup> 1 Ph. Ev. 83, 10th Ed.; Tayl. Evid. § 1236, 5th Ed. See note 4 to page 127.

*Bigamy.*

§ 177. The case of bigamy presents some difficulty. The first wife, or husband, as the case may be, is not a competent witness against the accused; but our books say that the second wife, or husband, is, *after proof of the first marriage*, for that then the second marriage is a nullity;<sup>1</sup> and the practice is in accordance with this. The truth however seems to be, that the second wife ought to be received in these cases as a witness against the accused, at any stage of the trial, on the same grounds which render the testimony of the wife receivable on indictments for abduction, under the 3 Hen. 7, c. 2, 9 Geo. 4, c. 31, and 24 & 25 Vict. c. 100.<sup>2</sup> It is an established principle that a woman is a competent witness against any one, even her lawful husband, who has done unauthorized violence, actual or constructive, to her *person*; besides, on a trial for bigamy, the objection to the competency of the injured female, on the ground that she is the wife of the accused, is a *petitio principii*; for whether she is his lawful wife, or whether he has violated the law by pretending to make her such, is the very point at issue. How strange then does it seem, that where, by a combination of falsehood, fraud, and sacrilege, a man obtains possession of a woman's person, property, and perhaps affection, her mouth is to be stopped against him because she is colorably his wife. This latter reasoning of course does not so strongly apply, to rendering the second *husband* competent \*on a charge of bigamy brought against

[ \* 250 ] a female; but the first does, viz., that lawful

<sup>1</sup> Tayl. Evid. § 1231, 5th Ed.; Rosc. Crim. Ev. 142, 4th Ed.

<sup>2</sup> *Supra*, § 176.

marriage or wrongful marriage, in violation of the peace of the Queen, is the direct point in issue.

*High treason; doubtful.*

§ 178. What is the rule on this subject in cases of high treason is a disputed point. Many eminent authorities lay down, that in such cases the testimony of married persons is receivable against each other,<sup>1</sup> on the ground of the great heinousness of the crime; and that the ties of allegiance to the sovereign and the obligation of upholding social order are more binding than those arising out of the relation of husband and wife, and must in the eye of the law be considered paramount to any other obligations whatever. To this it may be added, that although marriage is an institution of natural law, and as such antecedent to all forms of government, and even to the organization of civil society,<sup>2</sup> the complete unity of person between husband and wife is a fiction, which the law disregards in cases where the ends of justice require it.<sup>3</sup> There is, however, high authority the other way,<sup>4</sup> and most of the modern text writers seem disposed to consider the evidence not receivable.<sup>5</sup> They argue that as a woman is not bound to discover her husband's treason,<sup>6</sup> by parity of reason she cannot be a witness against him to prove it. But to this it may be answered, that one reason why the wife is not held responsible in such a

<sup>1</sup> So said (not decided, for that was not the point in question,) by the court in *Mary Grigg's case*, M. 12 Car. II., T. Raym. 1. To the same effect are Gilb. Ev. 133, 4th Ed.; B. N. P. 286; 2 Ev. Poth. 311.

<sup>2</sup> Pufendorf, De Jure Nat. & Gent. lib. 6, cap. 1.

<sup>3</sup> See *suprà*, §§ 176, 177.

<sup>4</sup> 1 Hale, P. C. 301. See also 48.

<sup>5</sup> Ph. & Am. Ev. 161; 1 Ph. Ev. 72, 10th Ed.; 1 Greenl. Ev. § 345, 7th Ed.; Tayl. Ev. § 1237, 5th Ed., &c.

<sup>6</sup> *Anon.*, P. 10 Jac. I., 1 Brownl. 47; Trials per Pais, 371. See however 1 Hale, P. C. 48.

[ \* 251 ] \*case is, that she owes her husband a kind of allegiance, and may be supposed to be acting under his coercion—we are not aware that a *husband* would be excused from the guilt of misprision in concealing the treason of his *wife*. Under the old feudal law in this country, when the vassal took the oath of fealty to his lord, it was with the express saving of the faith which he owed to the king his sovereign lord ;<sup>1</sup> probably on the principle stated by Lord Chief Baron Gilbert, that our “allegiance is founded on the benefit of our protection, which is to take place of our civil interests that relate only to well-being.”<sup>2</sup> But the question is an embarrassing one, on which the reader must form his own judgment.

*By statute.*

§ 179. The statutory exceptions to this rule are now extremely numerous. So early as the 21 Jac. 1, c. 19, s. 6, the commissioners of bankruptcy were empowered to examine upon oath the wife of any bankrupt, for the purpose of finding out and discovery of the estates, goods, and chattels of the bankrupt concealed, kept, or disposed of by her ; and this provision has been re-enacted in substance by “The Bankruptcy Act, 1869,” the 32 & 33 Vict. c. 71, ss. 96, 97.

§ 180. The clause in the County Court Act, 9 & 10 Vict. c. 95, which rendered the parties to suits competent witnesses in those courts, extended, as has been seen, to “their wives, and all other persons.”<sup>3</sup> But in the superior courts, the subsequent statute 14 & 15 Vict. c. 99, while it removed the restriction on the parties themselves in

<sup>1</sup> Litt. sects. 85–89.

<sup>2</sup> *Suprà*, § 173.

<sup>3</sup> Gilb. Ev. 134, 4th Ed.



almost all cases,<sup>1</sup> contained in its 3rd section an express clause, that nothing therein contained should “in any criminal proceeding render \*any husband competent or compellable to give evidence for or [ \* 252 ] against his wife, or any wife competent or compellable to give evidence for or against her husband” — language which gave rise to a doubt, whether husbands and wives were not thereby, by implication, rendered competent witnesses for and against each other in *civil* proceedings. This, after some conflict of opinion, was determined in the negative<sup>2</sup>—whether rightly or not is now immaterial to discuss; for by the 16 & 17 Vict. c. 83, s. 4, the proviso in the 6 & 7 Vict. c. 85, which continued the incompetency of the husbands and wives of the parties to a suit, &c., was repealed, and the following provisions were enacted:—

Sect. 1. “On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.”

Sect. 2. “Nothing herein shall render any husband

<sup>1</sup> *Suprà*, § 174.

<sup>2</sup> *Stapleton v. Crofts*, 18 Q. B. 367; *Barbat v. Allen*, 7 Exch. 609; *M'Neillie v. Acton*, 17 Jurist, 661.

competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery."

Sect. 3. "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose [ \* 253 ] \*any communication made to her by her husband during the marriage."

And now by the 32 & 33 Vict. c. 68, it is enacted as follows:

Sect. 1. "The fourth section of chapter ninety-nine of the statutes passed in the fourteenth and fifteenth years of her present Majesty, and so much of the second section of 'The Evidence Amendment Act, 1853,' as is contained in the words 'or in any proceeding instituted in consequence of adultery,' are hereby repealed."

Sect. 2. "*The parties to any action for breach of promise of marriage shall be competent to give evidence in such action*: provided always that no plaintiff in any action for breach of promise of marriage shall recover a verdict, unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

Sect. 3. "*The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding*: provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

3. *Competency of parties and their husbands or wives in revenue prosecutions.*

§ 181. We have seen that the 14 & 15 Vict. c. 99, having by its second section removed the incompetency of parties in general, retained by its third section the incompetency of persons who in any criminal proceeding were charged with the commission of any indictable offense, or any offense punishable on summary conviction; and both that statute and the 16 & 17 Vict. c. 83, s. 2, expressly provided that, in criminal proceedings, husbands and wives should not be competent or compellable \*to give evidence for or against each other.<sup>1</sup> In this state of the law arose the case of [ \* 254 ] *The Attorney-General v. Radloff*,<sup>2</sup> which was an information in the Exchequer by the attorney-general for an alleged violation of the revenue laws; and the question was raised whether the defendant was rendered a competent witness by the 14 & 15 Vict. c. 99. Pollock, C. B., before whom the case was tried, held his evidence inadmissible; and a verdict having been given for the crown, a rule was granted for a new trial on the ground that the witness had been improperly rejected. After argument and time taken to consider, the barons, differing in opinion, delivered their judgments separately; Pollock, C. B., and Parke, B., holding that the witness had been rightly rejected, and Platt and Martin, BB., that he ought to have been received. The rule for a new trial accordingly dropped; but several statutes have since been passed with the view of settling the law on this subject. The 17 & 18 Vict. c. 122, s. 15, enacted, that

<sup>1</sup> *Supra*, § 180.

<sup>2</sup> 10 Exch. 84.

the 2nd section of the 14 & 15 Vict. c. 99, should not be deemed to apply to any prosecution, suit, or other proceeding in respect of any offense, or for the recovery of any penalties or forfeitures, under any law then or thereafter to be made relating to the customs or inland revenue. This was repealed by the 18 & 19 Vict. c. 96, s. 44, and re-enacted by sect. 36 of that act. The 20 & 21 Vict. c. 62, without repealing that portion of the 18 & 19 Vict. c. 96, enacts in its 14th section, that "The several acts which declare and make competent and compellable a defendant, to give evidence in any suit or proceeding to which he may be a party, shall not be deemed to extend or apply to defendants in any suit or proceeding instituted under any act relating to the customs." It will be observed that this last statute only [ \* 255 ] \*speaks of acts relating to the *customs*, and none of the above acts makes any mention of the husbands or wives of the parties to the proceedings. But the 18 & 19 Vict. c. 96, s. 36, and the 20 & 21 Vict. c. 62, s. 14, are now repealed by 28 & 29 Vict. c. 104, s. 33. And sect. 34 of that statute enacts, that 14 & 15 Vict. c. 99, ss. 2 and 3, and 16 & 17 Vict. c. 83, "shall extend and apply to proceedings at law on the revenue side of the court; and any proceeding at law on the revenue side of the court shall not, for the purposes of this act, be deemed a criminal proceeding within the meaning of the said sections and act as extended and applied by the present section." By sect. 35, the revenue side of the court, as a court of law, shall be deemed to be a court of civil judicature within the meaning of sect. 103 of the Common Law Procedure Act, 1854, 17 and 18 Vict. c. 125; and sect. 22 contains a similar provision, relative to the Court of Exchequer exercising jurisdiction or authority in suits

relating to the revenues of the crown, and of the duchies of Lancaster and Cornwall, instituted and conducted according to the forms of equitable procedure.

4. *Competency of parties in the Court for Divorce and Matrimonial Causes.*

§ 182. The 14 & 15 Vict. c. 99, s. 4, as has been seen,<sup>1</sup> retained the incompetency of the plaintiff and defendant in all proceedings instituted in consequence of adultery.<sup>2</sup> And by sect. 48 of the 20 & 21 Vict. c. 85, which created the Court for Divorce and Matrimonial Causes, it was enacted that the rules of evidence observed in the superior courts of common law at Westminster should be applicable to and observed in the trial of all questions of fact in that court. The effect of the 32 & 33 Vict. c. 68, s. 3,<sup>3</sup> therefore, will be to render competent as witnesses, in that court, the parties to any \*proceeding instituted therein in consequence of adultery, and [ \* 256 ] the husbands and wives of such parties.

By the 22 & 23 Vict. c. 61, s. 6, it is enacted, that "On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion." And it was held, that a petitioner or respondent, who was examined under that section upon an issue of cruelty or desertion, might be *cross-examined* on the question of his

<sup>1</sup> *Suprà*, § 174.

<sup>2</sup> But a petition for restitution of conjugal rights, to which an answer had been filed, charging adultery, was held not to be within the act. *Blackborne v. Blackborne*, L. Rep., 1 P. & D. 563.

<sup>3</sup> See *suprà*, § 180.

or her adultery.<sup>1</sup> But it would seem that, since the 32 & 33 Vict. c. 68, s. 3, such cross-examination would not in general be admissible;—the language of that section being, “that no witness *in any proceeding* \* \* \* *shall be liable to be asked or bound to answer* any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.” (a)

*Certain persons who may seem incompetent witnesses—*

1. *The Sovereign.*

§ 183. Before dismissing the subject of the incompetency of witnesses, it will be necessary to advert to certain persons who, in consequence of their peculiar position or functions, may seem incompetent to give evidence. And foremost among these stands THE SOVEREIGN. It has been made a question whether he can be examined as a witness in our courts of justice, and if so, whether the examination must be on oath in the usual way. Conceding of course that no compulsory process could be used to obtain the evidence, it seems that both questions ought to be answered in the affirmative: and of this opinion are some modern text writers.<sup>2</sup> It has been objected that as the tribunal, at least the

[ \* 257 ] \*Court of Queen’s Bench, represents the sovereign, there is an absurdity in asking him to give

<sup>1</sup> *Boardman v. Boardman*, L. Rep., 1 P. & D. 233.

<sup>2</sup> Tayl. Ev. § 1246, 5th Ed. See Ph. & Am. Ev. 8.

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(a) In divorce cases a husband may testify to the impotence of the wife, *Barringer v. Barringer*, 69 N. C. 179, but not to prove her adultery. *Cook v. Cook*, 46 Ga. 608. So in Pennsylvania they are not compelled to do so. *Bronson v. Bronson*, 8 Phil. (Penn.) 261.

testimony to himself; but the same might be said of his pleading before himself, which nevertheless takes place in all criminal trials — where the sovereign is represented in one sense by the court, and in another by the attorney-general or those who act for him. In 2 Rol. Abr. 686, H. pl. 1, is the following passage: “Semble. que le roy ne poet estre un testimonie en un cause per son lettres desouth son signett manuell. Contra Hobard’s Rep. 288. enter Abigny et Clifton en Chancery allow. But in *Omi-chund v. Barker*,<sup>1</sup> L. C. J. Willes says, “Even the certificate of the king under his sign manual of a matter of fact (except in one old case in chancery, Hob. 213) has been always refused.” The case referred to in these books seems to be that of *Abignye v. Clifton*, Hob. 213, temp. Jac. I., in which the question was concerning a promise supposed by the plaintiff to be made to him of assurance of land upon the marriage of his lady, being daughter and heir apparent to Lord Clifton and his lady. “The king,” says the report, “by his letters under his signet manual certified to the late Lord Chancellor, and also to this, the manner and substance of the promise as it was made to his majesty: in regard whereof his majesty gave to the Lord Abignye £18,000 in lieu of £1,000 per annum in land which he had promised, which certificate was allowed upon the hearing for a proof without exception for so much.” This case stands alone, and amounts to little. 1. The evidence was admitted without exception taken. 2. It is probable that the reason for admitting it was, not that propter honoris respectum the sovereign could not be examined as a witness, but a forced analogy between the certificate of the king and the certificate of marriage given by a bishop, &c. And this

<sup>1</sup> Willes, 550.

[ \* 258 ] view derives some \*confirmation from the fact that in the same reign, in a case of *Alsop v. Bowtrell*,<sup>1</sup> the Court of King's Bench held for sufficient proof of a marriage at Utrecht, a certificate under the seal of the minister there, and of the town, that the parties had been married there, and that they cohabited for two years together as man and wife; a decision condemned by C. J. Willes in *Omichund v. Barker*, already cited, and clearly not law at the present day. Perhaps, also, as the certificate in *Abignye v. Clifton* related to a grant of money by the crown, the court may have confounded it with a royal charter: but in any view of that case it is far from a judicial determination that the testimony of the sovereign can *in general* be received without oath. Sir Matthew Hale also seems to have thought otherwise, for he says,<sup>2</sup> "If a man be indicted of high treason, the king cannot by his great seal or *ore tenus* give evidence, that he is guilty, for then he should give evidence in his own cause. Nay, although he may in person sit on the king's bench, yet he cannot pronounce judgment in case of treason, but it is performed by the senior judge, for as he cannot be a witness, so he cannot be a judge *in propria causa*. And the same law is for felony for the same reason, yet in some cases the king's testimony under his great seal is allowable, as in an *essoyn de servitio regis*, the warrant under the great seal is a good testimonial of it." If the sovereign is an incompetent witness under any circumstances, the whole of this passage is unmeaning and irrelevant. The only authorities, however, which Hale cites for the position, that even in criminal cases the sovereign cannot give evidence, are the old records of the reversal in parliament in the

<sup>1</sup> Cro. Jac. 541.

<sup>2</sup> 2 Hale, P. C. 282.



1 Edw. III. of the attainders, in the preceding reign, of the Earl of Lancaster and the Mortimers;¹ which \*certainly do not bear it out; for the ground of the reversal of those judgments appears clearly, [ \* 259 ] from the records themselves, to have been that the accused were not arraigned and tried by their peers in due course of law, but the king's asseveration of their guilt was taken as conclusive.² In Taylor on Evidence³ it is stated on the authority of Lord Campbell in his Lives of the Chancellors, that "the point arose in the reign of Charles I., when the Earl of Bristol, who was impeached for high treason, proposed to call the king for the purpose of proving certain conversations which he had held with him while prince. The subject was referred to the judges; but they, acting under the direction of his Majesty, forbore from giving any opinion, and the question remains to this day undetermined." In *The Attorney-General v. Radloff*,⁴ Parke, B., said incidentally, for it was wholly needless to the decision of the case, "It is clear that the sovereign cannot be a witness, because there is no means of compelling her attendance." But, although there may be no means of compelling the attendance of a witness who resides out of the jurisdiction of the court, his evidence is perfectly receivable if he attends voluntarily; and there are

¹ These records are set out at length in 1 Hale, P. C. 344, and 2 Id. 217, respectively.

² If the general lawlessness of the times of Edw. II. should be deemed insufficient to account for this enormous irregularity even in a state prosecution, a solution for it may be found in the views of the middle ages. For instance, in the laws of Wihtred, King of Kent, about the beginning of the 8th century, § 16, we read, "Let the word of a bishop and of the king be without an oath, incontrovertible." See ad id., Pufendorf, De Jur. Nat. & Gent. lib. 4, cap. 2, § 2, vers. fin.; Devotus, Inst. Canon. lib. 3, tit. 9, § XII., not. 1, 5th Ed.

³ § 1246, 4th Ed.

⁴ 10 Exch. 84, 94.

many questions which may be put to almost any witness, which it is quite discretionary with him whether he will answer. It only remains to add that no inference can be drawn from the fact that in the various cases of discharging firearms and throwing missiles at the sovereign, which [ \* 260 ] <sup>\*1</sup>have occurred from time to time,<sup>1</sup> the sovereign was not examined as a witness; for in proceedings for assault or other personal injury it is not requisite as matter of law that the injured party appear in the witness box; his absence is only matter of observation, which, in the case of the sovereign, would be fully answered by the inconvenience of calling such a witness, so long as any other satisfactory proof could be procured.

2. *Attorney in a cause*--3. *Counsel in a cause*.

§ 184. The other persons to whom we have alluded, as apparently incompetent to give evidence, are the counsel and attorneys engaged in a cause, and the judges and jurymen by whom it is tried. With respect to one of these there is no difficulty, for it is settled law and every day's practice that an attorney is a competent witness either for or against his client: although neither attorney nor counsel will be permitted, without the consent of the client, to disclose matters communicated in professional confidence.<sup>2</sup>(a) But whether the counsel in a

<sup>1</sup> See the cases of *Hadfield* in 1800, 27 Ho. St. Tr. 1282; of *Collins* in 1832, 5 C. & P. 305; of *Oxford* in 1840, 9 Id. 525, &c.

<sup>2</sup> *Infra*, bk. 3, pt. 2, ch. 8.

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(a) The privilege is for the benefit of the client and may be waived by him, or the client may call him as a witness thereto, where the communications are relevant evidence. *Riddles v. Aiken*, 29 Mo. 453; *Fossler v. Schreiber*, 38 Ill. 172; *Benjamin v. Coventry*, 19 Wend. (N. Y.) 353. So in an action between attorney and client for disobedience of instructions the attorney may testify to the communications made to him by his client; *Ware v. Baird*, 12

cause are competent witnesses was formerly a disputed question. In a case of *Stones v. Byron*,<sup>1</sup> which was tried before a sheriff, the plaintiff appeared by his attorney, who acted as his advocate, and who, after the witnesses on both sides had been examined, made a speech in reply, and proposed to call himself as a witness to contradict the defense set up. This was objected to, but allowed by the sheriff; and a rule was granted for a new trial, on the ground that the evidence ought to have been rejected, which came on for argument before Patteson, J., in the Bail Court. In support of the rule it was argued that "it would be a practice, attended with the most mischievous consequences, if an attorney or any other person, acting as the advocate of a party, \*could afterward present himself before the [ \* 261 ] jury as a witness to support those statements he had been making in the course of his speech. The characters of an advocate and a witness should be sedulously kept apart. The one was a person zealously and warmly espousing the interests of his client; the other a person sworn fairly and impartially, without bias or favor to either party, to tell the truth of what he had witnessed or heard. The jury might have considerable difficulty in separating those statements which they had heard from

<sup>1</sup> 4 Dowl. & L. 393; 1 B. C. R. 248; Mich. 1846.

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Ind. 318; or to recover his fees; *Mitchell v. Bromberger*, 2 Nev. 345. So where an attorney is employed by two persons, defendants in the same suit, in an action between them, either party may call the attorney as a witness to communications made to him by the other when both were present; *Parish v. Gates*, 29 Ala. 254; *Rice v. Rice*, 14 B. Monr. (Ky.) 417; but except in actions *between* the persons for whom he was acting jointly, he cannot be allowed to testify without the consent of all, and if one is dead, this does not remove the privilege. *Whitney v. Barney*, 33 Barb. (N. Y.) 393. Communications made *after* the relation of attorney and client have ceased are not privileged. *Mandeville v. Guernsey*, 38 Barb. (N. Y.) 225.

a person as advocate, from those which they had heard from the same person as witness." The only authorities cited were the precedent in the case of Sir Thomas More,<sup>1</sup> where the then solicitor-general, who was conducting the prosecution, left the bar and was received as a witness for the crown; which the counsel in *Stones v. Byron*, quoting the language of Lord Campbell in his Lives of the Chancellors, pronounced an "eternal disgrace of the court who permitted such an outrage on decency;" and the observations of the Court of King's Bench in *R. v. Brice*<sup>2</sup> (a) where it was held that the prosecutor of an

<sup>1</sup> 1 Ho. St. Tr. 386, 390.

<sup>2</sup> 2 B. & A. 606.

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(a) The law is well settled, that an attorney cannot be called upon to disclose any confidential communication made to him by his client, in the course of his employment, and this extends not only to communications, but also to documents of a confidential character deposited with him by the client. *March v. Ludlum*, 3 Sandf. Ch. (N. Y.) 35; *Riley v. Johnson*, 13 Ga. 260; *King v. Barrett*, 11 Ohio St. 261; *Wetherbee v. Ezekiel*, 25 Vt. 47; *Johnson v. Sullivan*, 23 Mo. 474; *Aiken v. Kilborn*, 27 Me. 252; *Parkhurst v. McGowan*, 24 Miss. 134; *Chirac v. Reinecker*, 11 Wheat. (U. S.) 294; *Moore v. Bray*, 10 Penn. St. 519; *Babo v. Bryson*, 21 Ark. 387; *Williams v. Fitch*, 18 N. Y. 546; *Hodges v. Miliken*, 1 Blood. (Md.) 503; *Foster v. Hall*, 1 Pick. (Mass.) 89; *Lyde v. McGregor*, 13 Allen (Mass.), 172; *Branden v. Gowing*, 7 Rich. (S. C.) 459; *Flack v. Neill*, 2 Tex. 273; *Alderman v. People*, 4 Mich. 414; *McManus v. State*, 2 Head (Tenn.), 213. Thus in *State v. Hazleton*, 15 La. Ann. 330, it was held that an attorney, who had been employed by a prisoner, and to whom communications had been made, and with whom during the course of his employment documents had been placed, could not be admitted in evidence against him in a criminal prosecution, and in *Whiting v. Barney*, 38 Barb. (N. Y.) 393, it was held that communications made to an attorney jointly by two clients who were jointly interested in the action, could not be received in evidence without the consent of both clients, and that the fact that one of the clients was *dead*, would not justify such disclosure from the attorney, even though if the deceased client were living he might be called upon to testify to the subject-matter of the disclosure, and even though the disclosure only related to arrangements for the loan of money. See, also, *King v. Barrett*, 11 Ohio (N. S.), 261. The privilege is the privilege of the client, and the attorney cannot testify even if he is willing to do so, without the consent of his client. *Wilson v. Rastall*, 4 T. R. 759; 1 Phillips on Evidence, 163; *Buller's Nisi Prius*, 284; *Chirac v. Reinecker*, 11 Wheat

indictment has no right to address the jury and state the case for the prosecution; for this among other reasons, that "the prosecutor may be, and generally is, a witness;

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(U. S.) 280; *Rhodes v. Selin*, 4 Wash. (U. S.) 718; *Jenkinson v. State*, 5 Blackf. (Ind.) 465; *Murray v. Dowling*, 1 Cranch's C. C. (U. S.) 157. Indeed, even though no objection is made, an attorney ought not to testify to matters confided to him by his client, and courts should not permit him to do so if he would; *Holmes v. Barbin*, 15 La. Ann. 553; and the privilege should be enforced by the courts of its own motion unless the client consents. *People v. Atkinson*, 40 Cal. 284; *Jenkinson v. The State*, 5 Blackf. (Ind.) 465.

It was held in *Cross v. Riggins*, 50 Mo. 335, that the rule protecting communications made by a client to an attorney might be extended to cover communications made by one to an attorney to whom no fee was paid, and when the attorney was not employed by him, but was afterward employed in the suit by the other side. The court placed this decision upon the ground that the rule protecting such communications had its origin from, and foundation upon, a sound public policy, which requires that there should be the utmost freedom between attorney and client, in order that the fullest confidence might exist, so that dissimulation and concealment should not be practiced, and thus the object of the rule be defeated. See, also, *Hull v. Lyon*, 27 Mo. 570. But, however much necessity there exists for this degree of confidence on the part of a client, and however deeply the rule protecting these communications made by a client to an attorney are predicated upon public policy, with all due deference to the court, it is submitted that, in order to bring the communications within the rule, it is essential that there should exist between the parties *the relation of attorney and client*. It is true that it is not necessary there should be a fee paid, but it is true that the client should consult the attorney in reference to the matter under such circumstances that the relation of attorney and client exists, which presupposes some species of employment, or desire to employ the attorney about the business about which he is consulted, and this is the very ground upon which the court proceeds in *Sargent v. Hampden*, 38 Me. 531. In that case the court held that even though no fee was paid, yet if there was any expectation of future employment in reference to the matter, or a failure to employ because the attorney would not be employed, it was enough; see, also, *March v. Ludlum*, 3 Sandf. Ch. (N. Y.) 35; *Hunter v. Van Bomhorst*, 1 Md. 504; *McManners v. State*, 2 Head (Tenn.), 213; and the mere fact that the counsel himself only regarded the communication as a merely casual conversation is of no account; the real question is, whether in point of fact it was a communication within the rule. *Moore v. Bray*, 10 Penn. St. 519.

The idea that a person can run through a whole State and talk about his case to every lawyer in it, with no view to their employment, and then, when he has subsequently employed other attorneys to attend to his case, turn about

and that it is very unfit that he should be permitted to state not upon oath, facts to the jury which he is afterward to state to them on his oath." It appears, however,

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and claim that the communications he had made to the other attorneys are privileged simply because they *are* attorneys, is both preposterous and absurd, and contrary to all authority.

In *Coon v. Swan*, 30 Vt. 6, what seems to be the true rule, and the rule generally adopted by the courts in reference to such matters, was laid down thus: "In order to render communications from a party to an attorney privileged from being disclosed in evidence by the latter, they must be of a *professional* and *confidential* character, and the attorney must be acting for the time being in the character of legal adviser, or *the party must have good reason to suppose he is so acting.*" In that case there was no employment, but a neighbor of the attorney was endeavoring, without any suit in court, to obtain from an insurance company the amount of a loss he had sustained. There was nothing said by either party about his being engaged in any litigation that might result, nor was any thing paid for his services, nor was there any expectation on his part to charge any thing therefor. The court held that the relation of attorney did not exist, and that the communications in reference to the fire made during this period were not privileged. See, also, *Thompson v. Kelbourne*, 28 Vt. 750; *Alderman v. People*, 4 Mich. 414; *Thompson v. Wilson*, 29 Ga. 539.

In *Whitney v. Barney*, 30 N. Y. 330, the court held that the privilege should be restricted to professional communications of clients having relation to some suit or judicial proceeding, either existing or anticipated, and must be restricted to *confidential* communications, and could not be extended to cover communications made in the presence of both parties to the suit, and this would undoubtedly be the rule as to communications made in the presence of third persons who are not connected with the litigation by interest or as witnesses, as such communications cannot in any sense be regarded as confidential. See *Gallagher v. Wilson*, 23 Cal. 331. But this is always a question for the court to determine. *Hull v. Lyon*, 27 Mo. 570.

The relation of attorney and client must exist. The mere fact that a communication is made by one to an attorney where no employment exists, where the attorney has not been retained, and where the party has not paid or does not expect to pay any thing, does not make the communication a privileged one. Thus, where a grantee of land obtained by fraud, by the advice of an attorney employed him to draw a deed of it to a third party, and *subsequently* the grantor and grantee in the deed so drawn by him, in a conversation in his presence, disclosed facts showing the conveyance to be a fraud, and that the whole transaction was in bad faith, it was held that, although both parties supposed that the attorney could not be called upon to testify to such disclosures, and one of them said to him on the occasion that he, being an attorney, could not be called as a witness against him, it was held in an action to set aside the conveyance, the attorney could, against the objection of the defend-

that in a case of *R. v. Milne*, reported in a note to *R. v. Brice*, Lord Ellenborough held, that a prosecutor who waived his right to give evidence was not even then enti-

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ants, testify to his advice and to their conversation. *Dunn v. Amos*, 14 Wis. 106; *Sitzar v. Wilson*, 4 Ired. (N. C.) 501.

In *Satterlee v. Bliss*, 36 Cal. 489, the court held that only those communications could be regarded as privileged which were made by the client in the course of and for the purpose of his employment, and that he was obliged to state by whom he was employed.

In *Marsh v. Home*, 36 Barb. (N. Y.) 649, it was held that, in order to make the statements made to an attorney by a person privileged, they must be made with the object and purpose of obtaining *professional advice*. In that case the attorney had formerly been employed by the party to prosecute a claim for him, and was, at the time when the communication was made, also employed by him as attorney in another suit; but the suit in relation to which the communications were made had been ended over two years before, and a judgment obtained which had been assigned. The court held that communications made in reference to the judgment under such circumstances could not be regarded as privileged.

In order to be protected, the communications must be made to an *attorney*, and communications made to a *pettifogger* or one *who has not been admitted to the bar*, although the client supposed he had been, are not protected. *Sample v. Frost*, 10 Iowa, 266.

In *Flack's Admrs. v. Neill*, 26 Tex. 273, the court say: "A communication, in order to be privileged, as made in professional confidence, must have been made to a person who was acting for the time being in the character of legal adviser of the person who made it, and must also have been made for the purpose of obtaining professional aid or advice in the matter to which the communication related.

In *Lynde v. McGregor*, 13 Allen (Mass.), 172, the court held that a communication made to an attorney at law, by a person not a client, seeking legal advice, is not privileged.

Neither can an attorney be compelled to produce or disclose the contents of an answer verified by a client since deceased, and left with him to be filed or not as he should think best, and which he had not filed. *Neal v. Patten*, 47 Ga. 73. But if no discretion had been given him in reference to the filing of the paper, he would have been compelled to produce the answer, as if it was drawn with the purpose of being filed, and with no discretion in himself in reference to its filing, it could in no sense be regarded as a privileged document, any more than a will or any other paper, the very purpose of which was that others might know the contents in due time.

Where a foreigner, unable to speak the language of the country in which he is about to bring an action, employs an interpreter to interpret between him and his attorney, the attorney cannot be compelled to state what was said

tled to address the jury. The true ground of the practice unquestionably is, that, in contemplation of law, the suit is the suit of the crown, and the prosecutor no more

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by the interpreter in his statement of the client's claim to him. *Maas v. Black*, 7 Ind. 202. This privilege does not extend to cases where the attorney and client both engage in the commission of wrongful acts. *Dudley v. Beck*, 3 Wis. 274; as where they conspired that the attorney should charge every person for whom he obtained a loan from his client a certain per cent for his services, which was more than the legal rate of interest, the greater part of which was to go to the client. *Id.* This privilege extends only to communications, and does not extend to *acts done* in the attorney's presence. *Patten v. Moor*, 9 Foster (N. H.), 163; as to the alteration or execution of a document in his presence. *Id.*; *Covenay v. Tannahill*, 1 Hill (N. Y.), 33. See also *McDougal v. Lane*, 18 Ga. 444; nor does it extend to communications made in the presence of all the parties to the suit. *Britton v. Lorenz*, 45 N. Y. 51; *Corbett v. Gilbert*, 24 Ga. 454; *Carr v. Wild*, 4 Green (N. J.), 319; nor to communications made by the client to third persons in the presence of the attorney, or derived from other sources than the client. *Chilcothe, &c., Co. v. Jameson*, 48 Ill. 281. Thus in *Woodruff v. Huron*, 33 Barb. (N. Y.) 557, it was held that an attorney was obliged to testify as to what occurred between his client and a person to whom he was loaning money, in reference to the rate of interest; nor when he himself is a party to the transaction, as where he is summoned as a garnishee, he will be compelled to disclose whether he has not received from his client certain funds in trust to pay a certain percentage to such of his creditors as would accept the same in full satisfaction of their demands against him. *Jeanes v. Freidenberg*, 3 Penn. L. J. Rep. 199; nor to what he has seen. Thus an attorney who was called to make a will for a person was held competent to testify to that person's mental condition. *Daniel v. Daniel*, 39 Penn. St. 191; and this has been held to apply to the case of a fraudulent deed which the attorney saw his client sign and to which he was himself an attesting witness. *Duffin v. Smith*, Peake's Cas. 108, and to a bill or answer in chancery which was sworn to in his presence. In either of these cases or any other of a similar character, he may be called to prove the *execution*, but not the contents of the instrument. *Buller's N. P.* 284; *Jupp v. Andrews*, Cowp. 846. When the privilege attaches, it extends to all communications made by the client in all cases in which he applies to his counsel for aid in the line of his profession. *Johnson v. Sullivan*, 23 Mo. 474; even to communications made in reference to the subject-matter of an affidavit which the attorney is retained to draw. *Williams v. Fitch*, 18 N. Y. 546; and does not cease with the attorney's retirement from the cause. *Andrews v. Thompson*, 1 Houston (Del.), 522. So it is held that the privilege extends to communications made by the attorney to one to whom he applies to become surety for his client in detailing the case to him. *Blunt v. Trents*, Anthon's N. P. (N. Y.) 180. So it has been held that one holding a paper delivered to him by his client is not compelled to produce



interested in it than any \*other witness.' Pat-teson, J., in the case we are now considering, [\* 262] took the view of the defendant's counsel, and made the

<sup>1</sup> 2 Rol. Abr. 685, "Testimonies," pl. 5; *R. v. Brice*, 2 B. & A. 606.

it before the grand jury as evidence against his client. *Anonymous*, 8 Mass. 370 (but it seems that the attorney can be compelled to produce any paper which the client could be compelled to produce,) *Andrews v. R. R. Co.*, 14 Ind. 169; *Ex parte Maulsby*, 13 Md. 625. See also *People v. Sheriff of N. Y.*, 29 Barb. (N. Y.) 622. Terms of compromise offered by an attorney for his client are not regarded as privileged and must be disclosed. *McTavish v. Denning*, Anthon's N. P. (N. Y.) 113; even though it is proposed if the terms of the compromise are carried out the attorney making the proposal shall act as attorney for both parties. *McLean v. Clark*, 47 Ga. 24. So it is held that an attorney who was employed to draw up a will may be called to testify to its contents, when the will is lost, and that such evidence cannot be regarded as a violation of the privilege, as it was intended by the client that the contents of the instrument should be known, at least, after his decease. *Graham v. O'Fallon*, 4 Mo. 338; *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175.

This privilege does not extend to a combination between attorney and client to prevent the court from compelling the production of papers important to the trial; *People v. Sheriff of New York*, 29 Barb. (N. Y.) 622; and where such papers are necessary for the purpose of identification, to that extent, even if the attorney was privileged from testifying to their contents, he can be compelled to produce them, and is guilty of contempt if he refuses; and if the papers are in court, the client can be compelled to produce them; *People v. Sheriff of New York*, *ante*; *Dudley v. Beck*, 3 Wis. 274; nor to communications made by one to his attorney who is seeking professional advice or assistance to enable him to forge a contract, and an attorney can be compelled to disclose such communications; *People v. Blakeley*, 4 Parker's Cr. Rep. (N. Y.) 176; see, also, *Brown v. Foster*, 40 Eng. Law & Eq. 353, where an attorney was held admissible to testify whether an entry in a day-book used against his client on a charge of embezzlement, had not been surreptitiously made therein by his client; *Patten v. Moor*, 9 Foster (N. H.), 163; but see *Dietrich v. Mitchell*, 43 Ill. 40, where it was held that an attorney was not bound to testify whether a certain guaranty was written above the payee's name and in a different handwriting on the back of a note, was there when it was placed in his hands for collection; also *Gray v. Fox*, 43 Mo. 570, where it was held that an attorney *will not be permitted* to testify as to the appearance and condition of a deed of trust and the trust notes at the time when they were exhibited to him on the occasion of his employment for the purpose of foreclosing the deed. An attorney must actually be retained by the party, or the privilege does not attach. Thus, where the opposite party made disclosures to an attorney for the other side after he had been retained on the other side, it was held that

rule absolute; saying that he did not think the course of proceeding adopted at the trial was proper, or consistent with the due administration of justice: that the evidence

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such disclosures were not privileged, although made when he expected to retain him, and with that view. *Thompson v. Wilson*, 29 Ga. 539. But *contra* see *Sargent v. Hampden*, 38 Me. 581; and in Georgia by statute, an attorney is made an incompetent witness against his client as to matters communicated to him. *Causey v. Wiley*, 27 Ga. 444.

It has been held that an attorney who is collecting a claim which has been assigned by his client may be compelled to testify that he acted on behalf of such client, and that the latter forbade him to pay over the proceeds to the assignee; *Mulford v. Muller*, 3 Abb. (N. Y. Ct. of App.) 330; nor does the privilege extend to a conveyancer even though he is an attorney, if no advice is sought, and he may be called upon to testify as to what occurred in relation to the transaction. *In re Bellis*, 3 Ben. (U. S.) 386; *Borum v. Fauts*, 15 Ind. 50; *Matthews' Estate*, 5 Penn. L. J. Rep. 149; *Hager v. Shindler*, 29 Cal. 47; *Randall v. Yates*, 48 Miss. 683; *De Woolf v. Strander*, 26 Ill. 225; but see *Rogers v. Griffin*, 64 Barb. (N. Y.) 373, where the attorney was asked whether the deed was read over to the grantees, and whether the question was raised whether the grantees would be personally liable on the deed, and the court held that the admission of the evidence was error, for which a new trial was granted.

So it is held that an attorney may be compelled to answer as to who his client was, when the relation began, and when it closed, and what amount was paid to him; *Shaughnessy v. Fogg*, 15 La. Ann. 330; *Gower v. Emery*, 6 Shep. (Me.) 79; *De Witt v. Perkins*, 22 Wis. 473; *Satterlee v. Bliss*, 36 Cal. 489; also through whose agency, in what manner and at what time he was retained; but when he states upon oath that he cannot answer questions put to him without disclosing matters confided to him by his client, or advice given by him to his client concerning business about which he was retained, he should be excused from testifying. *Shaughnessy v. Fogg, ante*; *Martin v. Anderson*, 21 Ga. 301. But he cannot be compelled to state whether he is employed to bring the suit for the individual benefit of his client. *Stephens v. Mattox*, 37 Ga. 289.

In *Mandeville v. Guernsey*, 38 Barb. (N. Y.) 225, it was held that an attorney who had appeared for a prisoner on trial for a crime, who was acquitted, was not privileged from testifying as to communications made to him by the prisoner after his acquittal and when the whole business was ended. So in *Williams v. Benton*, 12 La. Ann. 91, it was held that an attorney could not be excused from testifying to the contents of a deed left with him by one after the relation of attorney and client had ceased.

Third persons who overhear a confidential communication between an attorney and client may testify to it, *Hay v. Morris*, 13 Gray (Mass.) 519, although a son of the attorney; *Goddard v. Gardner*, 28 Conn. 172; but an interpreter, agent or a clerk in the attorney's office cannot be called; *Du Barre v. Livette*,

of the attorney ought not to have been received, and that, having been received, there ought to be a new trial. In a subsequent case of *Dunn v. Packwood*, also in the Bail

Peake, 78; *Andrews v. Solomon*, 1 Pet. C. C. (U. S.) 356; *Parkins v. Harkshaw*, 2 Starkie, 239; *Haverly v. French*, 3 Wend. (N. Y.) 837; *Taylor v. Foster*, 2 C. & P. 195; *Rex v. Upper Boddington*, 8 D. & R. 782; *Parker v. Carter*, 4 Munf. (Va.) 337; *Sibley v. Waffle*, 16 N. Y. 180; *Landsberger v. Gorham*, 5 Cal. 450, to the contrary.

As to whether an attorney's clerk may be called to testify to communications made by a client to the attorney in his hearing and presence is not definitely settled. In New York it is held that he cannot be, as will be seen by reference to *Sibley v. Waffle*, 16 N. Y. 189; *Pomer v. Kent*, 1 Cow. (N. Y.) 172, and *Haverly v. French*, 3 Wend. (N. Y.) 337; but in *Andrews v. Solomon*, 1 Pet. C. C. (U. S.) 356, it was held that the privilege does not extend to the clerk, and, although the matter has undergone much discussion, and has been variously decided in the English courts, it seems to be now well established there that the privilege extends to the clerk as well as to the attorney. *Taylor v. Forster*, 2 C. & P. 195; *Rex v. Upper Boddington*, 8 Dowl. & R. 726; 1 Phillips on Ev. 163.

A letter written by a client to his attorney, complaining of the course pursued by him, and stating that he has consulted with another lawyer, with a view of bringing the lawyer to whom the letter is addressed to a settlement, is not a privileged communication. *Lafin v. Harrington*, 1 Black (U. S.), 326. An attorney may be required to testify as to the name in which he brought an action, the persons to whom he paid the money collected, and by whose orders or direction he so paid it. *Fulton v. Maccraken*, 18 Md. 528.

So he may be called upon to testify as to what a certain witness swore to on a trial of his client's cause. *Com. v. Goddard*, 14 Gray (Mass.), 402. So as to what has been said to him by his client in reference to other matters when not acting as his attorney. *Wilson v. Goodlove*, 34 Mo. 337. So an attorney may be called to prove a bargain made between his client and one to whom he was lending money on a mortgage. *Prouty v. Eaton*, 41 Barb. (N. Y.) 409; *Milan v. State*, 24 Ark. 346. So he may be called as a witness against his client in reference to matters that have come to his knowledge from other sources than from his client. *Hunter v. Watson*, 12 Cal. 363. So he may testify to such communications, if called upon to do so by his client, if they are relevant; *Riddles v. Aiken*, 29 Mo. 453; but the disclosure will be restricted to the matters to which his attention was called on the examination in chief, and he cannot be called upon for any other communications, as the privilege continues as to all matters as to which it is not expressly waived. *Vallant v. Dodemead*, 2 Atk. 524; Phillips on Ev. 163.

It is not essential that a suit should be pending, or that there should be a regular retainer, or a fee paid, but the relation of attorney and client must exist, and the communication must be in a professional character, and in relation

Court,<sup>1</sup> a rule for a new trial was moved for on the ground that the plaintiff's attorney had acted as an advocate in the cause, and had then irregularly given evidence as a witness: on showing cause, the case of *Stones v. Byron* was referred to, but sought to be distinguished in this

<sup>1</sup> 11 Jurist, 242; 1 B. C. R. 312; S. C. nom. *Deane v. Packwood*, 4 D. & L. 395, note (b): Hil. 1847.

to some right or interest of the client, and does not apply to abstract legal opinions on general questions of law. *Mannus v. State*, 2 Head (Tenn.), 213. So in an action between attorney and client, for disobedience of instructions, he may disclose confidential communications made to him by his client. *Nave v. Baird*, 12 Ind. 318. But see *Dowell v. Dowell*, 3 Head (Tenn.), 502, where it was held that when, by the admissions of a client, a champertous contract between him and his attorney was found, the attorney could not be called to contradict it. *Quere*, why not?

Advice given by an attorney to a client is privileged; thus, in *Higbee v. Dresser*, 103 Mass. 523, it was held that where an attorney for a client who was engaged in the sale of intoxicating liquors had advised his client to get a note for the amount of a bill of liquor he had sold, and indorse the note to an innocent third person before its maturity, is a privileged communication to which the attorney cannot be called to testify. (But when a party puts himself upon the stand as a witness, he may be compelled to state on cross-examination what communications he has made to his attorney.) *Waburn v. Henshaw*, 101 Mass. 193. But see *Babo v. Bryson*, 21 Ark. 387, to the contrary. The privilege in regard to such communications as between attorney and clients extends to both parties; *Hemenway v. Smith*, 28 Vt. 701; but where there is no retainer and nothing to show that the party who sought advice, sought it with any view to regulate his future contract in regard to a pending or expected litigation, the communication cannot be said to be privileged; *Thompson v. Kilborne*, 28 Vt. 750; it must be a communication made to the witness by a party or client as his legal adviser, and for the purpose of obtaining his legal advice and opinion relative to some legal right or obligation. *Alderman v. People*, 4 Mich. 414.

Where two parties having business relations select the same attorney and make communications to him about the same in the presence of each other, they are treated as waiving the privilege as to such communications, and either party may call the attorney as a witness to testify to what was said by others relative to the transaction when both were present. *Parish v. Gates*, 29 Ala. 254. See, also, *Rice v. Rice*, 14 B. Monr. (Ky.) 417, where an attorney, who had been employed by two defendants in the same suit, was, in a suit between the two, held a competent witness as to disclosures made to him by the other in the presence of the other.

way, that in the actual case the attorney simply opened his client's case and then presented himself as a witness, and did not comment on the evidence offered by the other party, as was done in *Stones v. Byron*. Erle, J., however, made the rule absolute, saying, "I think it a very objectionable proceeding on the part of an attorney, to give evidence when acting as advocate in the cause." In the report in the Bail Court Reports, he is said to have added, "This principle was acted on by the late Lord Tenterden, and I think it is sound." It will be observed that both these cases are the decisions of single judges, whose language falls short of laying down as a universal rule, that under no circumstances whatever can a counsel or advocate be examined as a witness in a cause in which he is acting as such. It would, we apprehend, be impossible to support such a position, for there are cases in which the advocate might be the sole repository of the most important evidence: and it is no answer to \*this to say, that if aware of that fact he ought to decline to act professionally in the cause; [ \* 263 ] for it not unfrequently happens, especially in criminal courts, that facts bearing most powerfully on the issue appear relevant in the course of a trial, though at its commencement it was impossible to foresee their relevancy. Suppose an indictment for a murder at A., to which the defense set up is a false alibi, that the accused was on that day and hour in a certain room in a certain house at B.; the counsel for the prosecution may have been alone in that room at that day and hour, and may know of his own knowledge that the accused was *not* then there; is his evidence to be excluded? These cases, however, of *Stones v. Byron* and *Dunn v. Packwood*, taken at the strongest, only show that an advocate is not a competent

witness *for* his client, and leave untouched the question whether he is competent for the other side. Now it would be very dangerous to allow a party who knows that important, perhaps the only important, evidence against him will be given by an advocate, to shut that person's mouth by retaining him as his counsel; and if it be said that no counsel should accept the retainer under such circumstances, the answer is, that the question is not what the honor of the bar exacts, but what the law will allow. Professional privileges may be abused, and the supposed impeccability of every member of a numerous profession is an unsafe basis of legislation. Besides, it may be as well to remark, that under the old law, previous to the 6 & 7 Vict. c. 85, when an interest in the event of the suit was ground for the rejection of a witness, the rule did not apply to a case where the interest was *fraudulently* acquired in order to create incompetency.<sup>1</sup>

§ 185. Nor is this matter so barren of authority as appears to have been assumed in the two cases decided [ \* 264 ] <sup>\*in the Bail Court.</sup> In Bacon's Abridgment, Evidence, A. 3, it is said, "The inconveniency would be very great if a counsel were not at all to be made use of as a witness; for by this means every such person's evidence may be taken off by giving him a fee." In *Cuts v. Pichering*,<sup>2</sup> the court laid down *obiter*, that with respect to competency to bear testimony the same law was of an attorney or counsel. And Sir John Hawles, in his observations on the State Trials in 1 Jac. II.,<sup>3</sup> tells us, "Every man knows that a counsel has been

<sup>1</sup> Ph. & Am. 144.

<sup>2</sup> 11 Ho. St. Tr. 459.

<sup>3</sup> 1 Vent. 197.

enforced to give evidence against his client, provided it be not of a secret communication to him by his client." The same is stated in the book called "*Trials per Pais*:"<sup>1</sup> and in the cases of *Waldron v. Ward*<sup>2</sup> and *Sparke v. Middleton*,<sup>3</sup> counsel who had been employed by a party were examined. There can be no doubt that, to call an advocate in the cause as a witness is most objectionable, and should be avoided whenever possible; but we apprehend that a judge has no right *in point of law* to reject him; although, if the court above think that under all the circumstances any practical mischief has resulted from the reception of such a witness, they may, in their discretion, grant a new trial, if not as matter of right, at least as matter of judgment.

§ 186. These views are confirmed by the case of *Cobbett v. Hudson*.<sup>4</sup> After the 14 & 15 Vict. c. 99, had allowed parties to a suit to be witnesses, inasmuch as all persons who sue or defend in a court of justice may, if so disposed, conduct their own causes without legal assistance, it became clear that the question, whether a person who so conducts his own cause can also be a witness in it, must soon present itself for decision; \*and the point at length arose in the case referred to. At the trial before Lord Campbell, [ \* 265 ] C. J., the plaintiff, who sued in form *à pauperis*, conducted his cause in person. The Lord Chief Justice told him that if he addressed the jury as an advocate, he could not be permitted to give evidence as a witness. The plaintiff elected to act as advocate, and not as a witness.

<sup>1</sup> Page 385.

<sup>2</sup> Sty. 449.

<sup>3</sup> 1 Keb. 505. See, also, Mar. 83, pl. 136.

<sup>4</sup> 1 Ell. & Bl. 11.

A verdict having been given for the defendant, a rule was obtained for a new trial, on the ground that the above ruling was erroneous. This rule was argued before Lord Campbell, C. J., Coleridge, Wightman and Erle, JJ., and after time taken to consider, the following judgment was delivered by Lord Campbell: "We are of opinion that the rule for a new trial should be made absolute, on the ground that the plaintiff was improperly told he could not be permitted to address the jury as his own advocate, without agreeing to waive his right to be examined as a witness in his own behalf. We are fully aware of the inconvenient consequences which must follow from a party to a suit being alternately during the trial advocate and witness; and we express our strong disapprobation of such a practice. But we cannot say that the judge at nisi prius has at present sufficient authority to prevent it. Before the recent statute (14 & 15 Vict. c. 99), the party had a right to conduct his own cause in person, although he could not be his own witness; and by that statute (sect. 2) he is rendered 'competent and compellable to give evidence' as a witness, without any abridgment of his former right to act as his own advocate. We must be careful that we do not abridge the rights conferred on suitors by common or statute law, while we are acting merely on views of policy and expediency, with respect to which different judges may form different opinions. It was stated, at the trial, that verdicts had several times been set aside, on the sole ground that the same person had been permitted to act as advocate and \*to be examined

[ \* 266 ] as a witness; but when the cases alluded to are examined, it will be found that the rigid rule contended for is not laid down in them. In *Stones v. Byron*, 4 D. &



L.493, upon a trial before the sheriff, an attorney having addressed the jury as advocate for the plaintiff and then been examined as a witness for him, Patteson, J., observed: 'I must say that I do not think that such a course of proceeding is proper, or consistent with the due administration of justice. It seems to me, therefore, that his evidence ought not to have been received, and having been received, that there ought to be a new trial.' But there the evidence had been received after the defendant's case was closed, and after the plaintiff's advocate had replied; and this irregularity, testifying that the undersheriff who presided was unduly influenced, appears to have been a ground of the decision. In *Deane v. Packwood*, 4 D. & L. 395, note (b) (very shortly reported in a note to *Stones v. Byron*, 4 D. & L. 393), which was likewise a trial before the sheriff, the plaintiff's attorney, after addressing the jury as advocate, was examined as a witness; and Erle, J., granted a new trial on this ground, but without laying down a general rule on the subject, or professing to extend the authority of *Stones v. Byron*. In *R. v. Brice*, 2 B. & A. 606, it was laid down that, on the trial of an indictment for perjury, the prosecutor shall not be admitted to address the jury; the court observing: 'the prosecutor may be, and generally is, a witness; and it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterward to state to them on his oath.' But there the king was to be considered the party; and the private prosecutor had no right to address the jury, even if he waived his right to be examined as a witness. It was said, at the trial of this cause, that since the late Evidence Act (14 & 15 Vict. c. 99) passed, it had been decided, both before the chief justice of the Common

Pleas and the chief baron of the Exchequer, that a  
[ \* 267 ] \*party cannot be permitted to act as his own  
advocate and to be examined as his own witness: but, after diligent inquiry, no such decision can be discovered. The validity of the rule contended for, is rested on the authority of the judge at Nisi Prius to regulate the procedure in a way that may be most conducive to the investigation of truth; and the instance was referred to of an order for the witnesses to leave the court, with an intimation that any witness, who remains in court or returns into court before he is called, shall not be examined. But the judge must be governed by established practice and the general rules of law. With respect to ordering the witnesses out of court, although this is clearly within the power of the judge, and he may fine a witness for disobeying this order, the better opinion seems to have been that his power is limited to the infliction of the fine, and that he cannot lawfully refuse to permit the examination of the witness: see *Cook v. Nethercote*, 6 C. & P. 741; *Thomas v. David*, 7 Id. 350; *R. v. Colley*, 1 Moo. & Mal. 329. We may hope that, without any positive rule against a party addressing the jury and being examined as a witness on oath on his own behalf, a practice so objectionable is not likely to spring up; for it is not only contrary to good taste and good feeling, but, as it must be revolting to the minds of the jury, it will generally be injurious to those who attempt it. In such a case as the present there is not the smallest color for resorting to it; for the plaintiff, suing in formâ pauperis, had counsel assigned to him, who must be supposed to have been ready to support at the trial the certificate he had given, that the plaintiff had a good cause of action; and an offer was freely made to the plaintiff

to postpone the trial till the attendance of this gentleman could be procured. If the practice does gain ground to a degree seriously injurious to the due administration of justice, the legislature may interfere, or the judges, under the authority vested in them, may make a general order \*whereby it may be prevented in future. But, [ \* 268 ] as the law now stands, we think the judge at Nisi Prius exceeded his authority in refusing to allow the plaintiff to be examined as a witness on oath after addressing the jury as an advocate; and that upon a new trial he must be permitted to do both if he shall be so inclined." The rule for a new trial was accordingly made absolute.

#### 4. *Jurors.*

§ 187. Next as to the case of jurors. (It is fully settled that a juryman may be a witness for either of the parties to a cause which he is trying.<sup>1</sup>) And it is essential that this should be so, as otherwise persons in possession of valuable evidence would be excluded if placed on the jury panel, and might even be fraudulently placed there for the purpose of excluding their testimony. But here an important distinction must be borne in mind, viz., the difference between general information and particular personal knowledge. A writer on this subject states the rule thus.<sup>2</sup> "It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge; for it could not be known whether the verdict was accord-

<sup>1</sup> 3 Blackst. Com. 375; Trials per Pais, 384; 2 Hawk. P. C. c. 46, s. 17; 1 Lill. Pract. Reg. 552; 2 Id. 126; *R. v. Reading*, 7 Ho. St. Tr. 267; *R. v. Heath*, 18 Id. 123; *Bennet v. The Hundred of Hartford*, Sty. 233; *Fitzjames v. Moys*, 1 Sid. 133; *Anon.*, 1 Salk. 405; *R. v. Rosser*, 7 C. & P. 648; *Manley v. Shaw*, Car. & M. 361.

<sup>2</sup> 1 Stark. Ev. 542, 3rd Ed.; Id. 816, 4th Ed. See acc. 1 Lill. Pract. Reg. 552; 2 Id. 126; 6 Ho. St. Tr. 1012 (note); 18 Id. 123.

ing to or against the evidence; it is very possible that the private grounds of belief might not amount to legal evidence. And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he privately state such facts it will be a ground of motion for a new trial." This distinction

[ \* 269 ] is well illustrated by the following cases. In *R. v. Rosser*,<sup>1</sup> the accused was indicted for stealing in a dwelling-house a watch and seals, alleged to be of the value of 7*l.*; and a witness for the prosecution, having sworn that the property in his opinion was worth that sum, the jury, after the summing-up, inquired if they were at liberty to put a value on the property themselves. To this Vaughan, J., answered, "If you see any reason to doubt the evidence on the subject, you are at liberty to do so. Any knowledge you may have on the subject you may use. Some of you may perhaps be in the trade." And Parke, B., added, "If a gentleman is in the trade, he must be sworn as a witness. That general knowledge which any man can bring to the subject may be used without; but if it depends on any knowledge of the trade, the gentleman must be sworn." And in *Manley v. Shaw*,<sup>2</sup> which was an action against the acceptor of a bill of exchange, after the handwriting of the defendant had been proved, one of the jury, on looking at the bill, said that the stamp was a forgery, and stated to the court that several respectable houses had been found in possession of forged stamps to a great amount: on which Tindal, C. J., said, "The gentleman of the jury who says that the

<sup>1</sup> 7 C. & P. 648.

<sup>2</sup> Carr. & M. 361.

stamp is a forgery, should be sworn as a witness to give evidence to his brother jurors before they can act upon his opinion;" and told the juryman that if he thought proper he might be sworn and examined as a witness to prove the forgery. The juryman declining this, and there being no other evidence, the judge directed a verdict for the plaintiff.

### 5. *Judges.*

§ 188. Lastly, with respect to judges. Notwithstanding the language attributed to Gascoigne, C. J., on this \*subject,<sup>1</sup> it is clearly no objection to the competency of a witness that he is named as a judge [ \* 270 ] in the commission under which the court is sitting.<sup>2</sup> But a distinction has been taken with respect to the judge who is actually trying the cause;<sup>3</sup> and it is observed that on the trial of one of the regicides in 1660, when two of the members of the commission came down from the bench to give evidence, they did not return to it until after that trial was concluded: 'this, however, may have been matter of taste and feeling. When a nobleman is tried by the House of Lords, any of the peers is a competent witness;<sup>4</sup> but then on such occasions each peer sits in the capacity both of judge and juryman. The objection, if it be one, to the competency of the presiding judge at the trial rests, not on the ground of his having to form a judgment on the case — this argument would exclude the juryman — but on one analogous to that urged against

<sup>1</sup> P. 7 H. IV. 41 A., and see Plowd. 83.

<sup>2</sup> 2 Hawk. P. C. c. 48, s. 17; Bac. Abr. Ev. (A. 2); *R. v. Hacker*, J. Kely. 12; Observations of Sir J. Hawles, 11 Ho. St. Tr. 459.

<sup>3</sup> Tayl. Ev. § 1244, 4th Ed.; 1 Greenl. Ev. § 364, 7th Ed.

<sup>4</sup> *R. v. Hacker*, J. Kely. 12.

<sup>5</sup> *Lord Stafford's case*, 7 Ho. St. Tr. 1384, 1458, 1552; *Earl of Macclesfield's case*, 16 Id. 1252, 1391.

the competency of counsel, viz., the difficulty which the jury would have in discriminating between his testimony, and his direction to them on matters of law or his comments on the evidence given by other witnesses; to which the same answer presents itself, namely, that the presiding judge may be the sole depository of important evidence, the relevancy of which to the issue raised cannot even be suspected until the case is gone into. Besides, the litigant parties have no voice whatever in the selection of the judge, and cannot challenge him, either peremptorily or for cause. Sir John Hawles, in the observations to which we have already referred, says,<sup>1</sup> “Every man [ \* 271 ] \*knows that a judge in a civil matter tried before him has been enforced to give evidence, for in that particular a judge ceases to be a judge, and is a witness; of whose evidence the jury are the judges, though he after re-assume his authority, and is afterward a judge of the jury’s verdict.” There can be no doubt, however, that if a judge gives evidence he must be sworn, and be examined and cross-examined like any other witness.

<sup>1</sup> 11 Ho. St. Tr. 459.

## \* CHAPTER III.

[ \* 272 ]

## GROUNDS OF SUSPICION OF TESTIMONY.

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*Exceptions to the credit of witnesses.*

§ 189. "Exceptions to the credit of the witness," says Sir Matthew Hale,<sup>1</sup> "do not at all disable him from being sworn, but yet may blemish the credibility of his testimony, and in such case the witness is to be allowed, but the credit of his testimony is left to the jury, who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility of the witness and his testimony, and these exceptions are of that great variety and multiplicity, that they cannot easily be reduced under rules or instances." They have been immensely increased in consequence of the statutes 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 and 17 Vict. c. 83; as interest in the event of the cause and infamy of character, which before those statutes constituted objections to the *competency* of a witness, may now be urged to the jury as objections to his *credit*.<sup>2</sup>

<sup>1</sup> 2 Hale, P. C. 276, 277.

<sup>2</sup> On the value of human testimony in general, see Introduction, pt. 1.

*Interests and motives producing falsehood and misrepresentation.*

§ 190. "Witnesses," says Sir Edward Coke,<sup>1</sup> "ought to come to be deposed untaught, and without \*in-  
[ \* 273.] struction, and should wish the victory to the party that right hath, and that justice should be administered: and should say from his heart, 'Non sum doctus, nec instructus, nec curo de victoriâ, modo ministretur justitia.'"<sup>2</sup> This truly happy frame of mind is, however, not always met with, for there is no possible interest or motive which may not, under some state of circumstances, taint the testimony of man with falsehood or misrepresentation. Much of course depends on the physical constitution, and the character, moral and religious, of the individual. Some persons seem almost above any degree of temptation; others who resist long succumb at last; others yield on slight pressure; and some scarcely wait to be tempted. To enumerate these interests or motives would be to enumerate the springs of human action;<sup>3</sup> but the following are among the principal.

*Pecuniary interest.*

§ 191. First, then, of *pecuniary* interest, as being the most obvious. This was formerly a ground of incompetency;<sup>4</sup> and in order to estimate its weight, the condition and circumstances in life of the witness should, if practicable, be ascertained and taken into consideration. The temptation which poverty affords to perjury needs little comment.

<sup>1</sup> 4 Inst. 279.

<sup>2</sup> See acc. Devotus, Inst. Canon. lib. 3, tit. 9, § XVII. 5th Ed.

<sup>3</sup> See further on this subject, 5 Benth. Jud. Ev. bk. 10, ch. 2 *et seq.*

<sup>4</sup> *Suprà*, ch. 2.



".....Jures licet et Samothracum  
Et nostrorum aras; contemnere fulmina pauper  
Creditur atque deos, dis ignoscentibus ipsis." <sup>1</sup>

"En grande pauvreté n'y a pas grande loyauté." <sup>2</sup>

Expressions like these however are, if understood literally, libels on human nature; and the rich and great are subject to temptations of their own.<sup>3</sup>

*Relations between the sexes.*

\* § 192. Secondly, a powerful source of false testimony is to be found in the relations be- [ \* 274 ]  
tween the sexes. Previous to the 16 & 17 Vict. c. 83, husband and wife were incompetent witnesses for or against each other in most civil, as they still are in most criminal, cases<sup>4</sup>—an exclusion based not so much on supposed affection between them, as on an artificial unity of person established by the policy of law. But the existence of any other relation of this kind—such as that of a man with his kept mistress, &c.,—only goes to the credit of a witness. Whether a man's wife or his kept mistress is most likely to bear false testimony in his favor, depends on circumstances. In the one case there is by law an almost indissoluble unity of person, accompanied most usually by a unity of interest, but still where affection may or may not exist: in the other the relation probably originated in at least some degree of affection on the part of the man; but then he may at any moment put an end to it, which in many instances would deprive a woman of the means of subsistence, whose reputation has been forfeited.

<sup>1</sup> Juvenal. Sat. 3, vv. 144 *et seq.*

<sup>2</sup> Bonnier, *Traité des Preuves*, §§ 190 & 320.

<sup>3</sup> *Infra.*

<sup>4</sup> See the preceding chapter.

*Other domestic and social relations.*

§ 193. Thirdly, the interest arising out of other domestic and social relations. This may have its source either in affection, desire of revenge, or a dread of oppression or vexation. In the laws of some countries, blood relationship within certain degrees has been made a ground of incompetency; and friendship or enmity with one of the litigant parties may justly cause evidence to be looked on with suspicion.<sup>2</sup> Nor do even these supply the most efficient motives to falsehood. A parent in his family, a military, ecclesiastical, official, or feudal superior may often, without exposing himself to danger, [ \* 275 ] \*or even shame, inflict mischief almost boundless on those who are subject to his authority. "Idonei non videntur esse testes, quibus imperari potest, ut testes fiant," said the Roman law.<sup>3</sup> Among us, however, this only goes to the credit of the witness.

*Desire to preserve reputation.*

§ 194. Fourthly. Perjury is often committed to preserve the reputation of the swearer. An example of this may be seen in those cases, and they are of frequent occurrence, where the person called as a witness has, on some former occasion, given a certain account of the transaction about which he is interrogated, and is afraid or ashamed to retract that account.

<sup>1</sup> Dig. lib. 22, tit. 5, ll. 4 and 5; Domat, Lois Civiles, Part 1, liv. 3, tit. 6, sect. 3, § X.

<sup>2</sup> Dig. lib. 22, tit. 5, l. 3; lib. 48, tit. 18, l. 1, §§ 24 & 25; Domat, in loc. cit. §§ XI. and XII.

<sup>3</sup> Dig. lib. 22, tit. 5, l. 6.

*Interest in or sympathy for others.*

§ 195. Fifthly. The last source of bias which we shall notice is the feeling of interest in or affection for others. A man who belongs to a body, or is a member of a secret society, governed by principles unknown to the rest of mankind, comes before the tribunal loaded with the passions of others in addition to his own.<sup>1</sup> To this head belong those cases, where mendacious evidence is given through the sympathy generated by a similarity of station in life, or a coincidence of social, political, or religious opinions, and the like. This is very frequently found in witnesses from the higher walks of society; and it is not easy for a hostile advocate to deal with such witnesses:—for although it is evident they are misleading the tribunal, their station and demeanor alike render it unsafe to speak of them as perjured.<sup>2</sup>

<sup>1</sup> Introd. pt. 1, § 20.

<sup>2</sup> “Si deficietur numero” (scil. testium) “pars diversa, paucitatem; si abundabit, conspirationem; si humiles producet, vilitatem; si potentes, gratiam oportebit incessere.” Quintil. Inst. Orat. lib. 5, c. 7.

[ \* 276 ]

## \*PART II.

## REAL EVIDENCE.

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*Real evidence — Sometimes direct — Usually circumstantial.*

\*§ 196 "Real Evidence" — the *evidentia rei vel facti* of the civilians<sup>1</sup> — means all evidence [\* 277] of which any object belonging to the class of *things* is the source; *persons* also being included in respect of such properties as belong to them in common with things.<sup>2</sup> Thus where an offense or contempt is committed in presence of a tribunal, it has direct real evidence of the fact. So, formerly, on an appeal of mayhem, the court would in some cases inspect the wound, in order to see whether it were a mayhem or not;<sup>3</sup> and if the mayhem was obvious, such as striking off an arm, &c., the proof was both real and direct. But in most instances real evidence is only circumstantial in its nature,<sup>4</sup> *i. e.*, evidence from which the existence of the principal fact is inferred by a process of reasoning.

*Immediate real evidence — Sometimes exacted by law — Sometimes by practice — Often produced when not exacted — Views and models.*

§ 197. Real evidence is either *immediate* or *reported*.<sup>5</sup> *Immediate* real evidence is where the thing which is the source of the evidence is present to the senses of the tribunal.<sup>6</sup> This is of all proof the most satisfactory and con-

<sup>1</sup> Mascard. de Prob. Quæst. 8 Calv. Lexic. Jurid.; and the judgment of Lord Stowell in *Evans v. Evans*, 1 Hagg. C. R. 105.

<sup>2</sup> 3 Benth. Jud. Ev. 26; 3 Id. 53.

<sup>3</sup> 28 Ass. pl. 5; 22 Id. pl. 99; 37 Id. pl. 9. See, also, Mascardus de Prob. Quæst. 8, n. 10.

<sup>4</sup> See 1 Benth. Jud. Ev. 55; 3 Id. 33.

<sup>5</sup> 3 Benth. Jud. Ev. 33.

<sup>6</sup> Where the production of real evidence in open court would be indecent, the jury may inspect it in private; as was done in the case before Lord Hale,

vincing — “Cum adsunt testimonia rerum, quid opus est verbis”<sup>1</sup> — but, as already stated, it is rarely available, at least with respect to principal facts. And so [\* 278] \*sensible is the law of its transcendent value, that in some cases the production of certain species of real evidence is peremptorily exacted, to the exclusion of all substitutes. Thus, a coroner’s inquest to ascertain the cause of the death of a person who has died suddenly, must be held *super visum corporis*.<sup>2</sup> So when a fine was levied the parties were required by the ancient statute 18 Edw. 1, st. 4, *Modus levandi fines*, to appear personally before the justices, in order that it might be discerned by them if they were of full age and good memory, &c.<sup>3</sup> And the same seems to hold in the case of a recognizance,<sup>4</sup> which is always expressed to be entered into on the personal appearance of the party before the justice who takes it.<sup>5</sup> On this principle, in a great degree, rests the just and sound rule of English judicature, that the evidence of witnesses must in general

where a man successfully defended himself against a charge of rape by showing that he had a frightful rupture, 1 Hale, P. C. 635, 636. See, also, Bonnier, *Traité des Preuves*, § 77.

<sup>1</sup> 2 Bulst. 53. On this subject Mascardus (*de Prob. Quæst.* 8, n. 20), and Bonnier (*Traité des Preuves*, § 51) quote the well-known lines from the *Ars Poetica* of Horace:

“Segnius irritant animos demissa per aurem,  
Quàm quæ sunt oculis subjecta fidelibus.”

<sup>2</sup> 1 Blackst. Com. 348; 4 Id. 274; Holt, 167, 21 Edw. 4, 70, 71; 6 & 7 Vict. c. 83, s. 2.

<sup>3</sup> For this reason a fine levied by an idiot, lunatic, &c., was good, for the law presumed that the judge would not allow the party to levy it unless he were of sound mind. See *Beverley’s case*, 4 Co. 123 b; *Mansfield’s case*, 12 Id. 124; and the argument in *Molton v. Camroux*, 2 Exch. 487.

<sup>4</sup> *Beverley’s case*, 4 Co. 124 a. Semble per Parke, B., in *Molton v. Camroux*, 2 Exch. 487, 493.

<sup>5</sup> See the precedents in Dalton’s Country Justice, Burn’s Justice of the Peace, &c.

be given by them personally in open court—the real evidence afforded by their demeanor being one of the most powerful securities against perjury and fraud. There are likewise instances where the production of real evidence is exacted by practice. Thus on an indictment for larceny, if the stolen property has been found, the court usually insists on its being produced before the jury; although, when the goods stolen are of a perishable nature, this is of course frequently impossible; neither would it be required when likely to be inconvenient or offensive, as where flesh stolen is in an advanced state of decomposition, &c. But real evidence is often produced at trials, when it is not exacted by any \*rule either of law or practice. Valuable evidence of this kind is sometimes given by means [ \* 279 ] of accurate and verified models,<sup>1</sup> or by what is technically termed a “view,” *i. e.*, a personal inspection by some of the jury of the *locus in quo*—a proceeding allowed in certain cases by the common law,<sup>2</sup> and much extended by the statutes 4 Anne, c. 16, s. 8; 6 Geo. 4, c. 50, s. 23, and 15 & 16 Vict. c. 76, s. 114. But the law on this subject has received an important addition by the 17 & 18 Vict. c. 125, s. 58, which enacts, that “either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court, or a judge, if they or he think fit, to make such rule or order, upon such terms as to costs and otherwise as such court or judge may direct: Provided, always, that

<sup>1</sup> It is the same in France. See Bonnier, *Traité des Preuves*, § 55.

<sup>2</sup> F. N. B. 123 C., 128 B., 184 F.; 2 Salk. 665; 2 Wms. Saund. 44 a, note 4.

nothing herein contained shall affect the provisions of the 'Common Law Procedure Act, 1852,' or any previous act, as to obtaining a view by a jury: Provided, also, that all rules and regulations now in force and applicable to the proceedings by view under the last-mentioned act shall be held to apply to proceedings for inspection by a jury under the provisions of this act, or as near thereto as may be."

*Reported real evidence — Infirmities of.*

§ 198. *Reported* real evidence is, where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents.' This sort of proof is, from its very nature, less satisfactory and convincing than immediate real [\* 280] \*evidence. "To the reporting witness indeed, if his report be true, it was so much immediate, so much pure real evidence: but to the judge it is but reported real evidence. The distinction is far from being a purely speculative one: practice requires to be directed by it. Reported real evidence is analogous to hearsay evidence, and labors more or less under the infirmities which attach to that modification of personal evidence, compounded of circumstantial evidence and direct — of real evidence, and ordinary personal evidence (evidence given in the way of discourse): it unites the infirmities of both. The lights afforded, or said to have been afforded, by the real evidence, are liable to be weakened in intensity, and altered in color, by the medium through which it is transmitted." <sup>2</sup>

<sup>1</sup> 3 Benth. Jud. Ev. 33.

<sup>2</sup> 3 Benth. Jud. Ev. 34.



*Circumstantial real evidence—Value and dangers of, chiefly conspicuous in criminal proceedings—Infirmative facts, or hypotheses.*

§ 199. Circumstantial real evidence partakes of the nature of all other circumstantial evidence in this, that the persuasions or inferences to which it gives rise are sometimes *necessary* and sometimes only *presumptive*. And as it is in criminal proceedings that the value and dangers of this mode of proof are chiefly conspicuous, we shall devote the rest of this chapter to a consideration of its probative force and infirmative hypotheses in those proceedings. By "*infirmative fact*" or "*hypothesis*" is meant any fact or hypothesis which, while insufficient in itself either to disprove or render improbable the existence of a principal fact, yet tends to weaken or render *infirm* the probative force of some other fact which is evidentiary of it.<sup>1</sup>

*Necessary inferences from circumstantial real evidence.*

§ 200. In the case of *necessary* inferences, properly so called, there can be no infirmative facts or hypotheses. \*As instances—where a female was found dead in a room, with every sign of having [\* 281] met a violent end, the presence of another person at the scene of action was demonstrated, by the bloody mark of a *left hand* visible on her *left arm*.<sup>2</sup> And where a man was found killed by a bullet, with a discharged pistol lying beside him, the hypothesis of suicide from that

<sup>1</sup> See 3 Benth. Jud. Ev. 14. "Socrates, who, professing to affirm nothing, but to *infirm* that which was affirmed by another, hath exactly expressed all the forms of objection, fallacy and redargution:" Bac. Adv. Learn. Book 2.

<sup>2</sup> Case of *Norkott* and others, 10 Harg. St. Tr. App. No. 2, p. 29.

pistol was negatived, by proof that the bullet which caused his death was too large to fit it.<sup>1</sup>

*Presumptive inferences from circumstantial real evidence.*

*Physical coincidences and dissimilarities — Inculpativ effect of — Exculpativ effect of.*

§ 201. Cases of this kind are, however, of rare occurrence, and when they do present themselves the facts speak too plainly to need comment. In the vast majority of instances, the inference to which a piece of circumstantial real evidence gives rise is only *probable* or *presumptive*. On charges of homicide, for instance, the nature of the weapon with which the fatal blow was given, is of the utmost importance in determining whether malice existed or ought to be presumed; on charges of rape, the clothes worn by the female at the time of the alleged outrage, torn and stained, or untorn and unstained, as the case may be, afford a strong presumption for or against the charge. But physical coincidences and dissimilarities, often of a most singular kind, frequently lead to the discovery of the perpetrators of offenses, or establish the innocence of parties wrongly accused of them. Several instances of the former are given in Starkie on Evidence.<sup>2</sup> Thus, in a case of burglary,—where the thief gained admittance into the house by opening a window with a penknife, which was broken in the attempt,—part of the blade was left sticking in the window frame, and a broken [ \* 282 ] knife, the fragment \*of which corresponded with that in the frame, was found in the pocket of the prisoner. So, where a man was found killed by a

<sup>1</sup> Theory of Pres. Proof, App. case 2; Wills, Circumst. Ev. 80, 3rd Ed. See other instances in Beck's Med. Jurispr. p. 591, 7th Ed.

<sup>2</sup> 1 Stark. Ev. 562, 3rd Ed.; 844, 4th Ed.

pistol-shot, and the wadding in the wound consisted of a part of a ballad, the corresponding part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches corresponded with an impression found on the soil close to the place where the murdered body lay. ( In a case of robbery, the prosecutor, when attacked, struck the robber on the face with a key, and a mark of a key with corresponding wards was visible on the face of the prisoner.<sup>1</sup> Mascardus also relates an instance where an inclosed ground set with fruit trees was broken into by night, and several fruits eaten, the rinds and fragments of some of which were found lying about. On examining these, it appeared that the person who ate them had lost two front teeth, which caused suspicion to fall on a man in the neighborhood who had lost a corresponding number, and who on being taxed with the theft confessed his guilt. In some cases, also, the fact of the accused being left-handed becomes an adminiculum of evidence against him, *i. e.*, when surrounding circumstances show that the offense must have been perpetrated by a left-handed person.<sup>2</sup> Few things have led to the detection of more forgeries than the Anno Domini water-mark on paper; and in one old case a criminal design was detected, by a letter purporting to have come from Venice being written on paper made in England.<sup>3</sup>

Strong, however, as coincidences and dissimilarities of this nature undoubtedly are, we must be careful not to attribute to them, when standing alone, a conclusive

<sup>1</sup> Mascard. de Prob. Quæst. 8, n. 28.

<sup>2</sup> See the case of *William Richardson*, Appendix, No. I.; and *Patch's case*, Beck, Med. Jurispr. 583, 7th Ed.

<sup>3</sup> Moore, 817.

effect in all cases. Just let it be remembered that the  
[ \* 283 ] \*men who were found in possession of the broken knife, and the fragment of the ballad (the latter especially), might have picked them up where they had been thrown away by the real criminals; that the person the print of whose knee was visible on the soil near the murdered corpse might have been a passer by who knelt down to see if life were really extinct, or to render assistance to the sufferer; that the having lost front teeth, or being left-handed, are not very uncommon, add to which that some persons are what is called "ambidextrous," *i. e.*, use both hands with equal facility; that the Anno Domini water-mark on paper is by no means infallible, the year being often anticipated by the manufacturer; <sup>2</sup> that, in the present age of the world at least, a person writing at Venice on a sheet of paper brought or imported from England is scarcely improbable; and that even the impression made on the face by the key might have been caused by a blow from the same or a similar key at some other time,<sup>3</sup> or might possibly be a natural mark. An excellent instance of how closely the propensity to run after coincidences ought to be watched, is presented by the case of one Fitter, who was indicted at the Warwick assizes of 1834 for the murder of a female. He was a shoemaker; and his leathern apron having on it several circular marks, made by paring away superficial pieces, it was supposed that they had been removed as containing spots of blood; it was, however, satisfactorily proved in his defense that he had cut them off for plasters for a neighbor.<sup>4</sup>

<sup>1</sup> Tayl. Med. Jurisp. 230, 3rd Ed.

<sup>2</sup> Wills, Circ. Ev. 29 and 114, 3rd Ed.

<sup>3</sup> Goodeve, Evid. 29.

<sup>4</sup> Wills, Circ. Ev. 128, 3rd Ed.

It is when taken in connection with other evidence that physical coincidences and dissimilarities are chiefly valuable, when they certainly press with fearful weight on a criminal. But if their presence is powerful for conviction, \*their absence is at least equally powerful for exculpation. Sir Matthew Hale relates a [ \* 284 ] remarkable instance of a man who rebutted a charge of rape by showing that he labored under a frightful rupture, which rendered sexual intercourse almost, if not absolutely, impossible.<sup>1</sup> This is, however, an old case, and should a similar one arise, the perfection which the manufacture of trusses has attained in modern times would be an infirmative circumstance not to be overlooked.

*Infirmative hypotheses affecting real evidence — Accident — Irresponsible agency.*

§ 202. The infirmative hypotheses affecting real evidence, however, present a subject of too much importance to be dismissed with a cursory notice. Considered in the abstract, real evidence, apparently indicative of guilt, may be indebted for its criminative shape to *accident, forgery, or the lawful action of the accused*. Here, it must not be forgotten, that sometimes the most innocent men cannot explain or give any account whatever of facts which seem to criminate them; and the experience of almost every person will supply him with instances of extraordinary occurrences, the cause of which is, to him at least, completely wrapt in mystery. Accident. The appearance of blood on the person of an accused or suspected person may be explained by his having, in the dark, come in contact with a bleeding body.<sup>2</sup> Under

<sup>1</sup> 1 Hale, P. C. 635, 636.

<sup>2</sup> See the case of *Jonathan Bradford*, Theory of Pres. Proof, Appendix, case 7. In Chambers's Edinburgh Journal also, for 11th March, 1837, there is

this head come those cases where the appearance is the result of irresponsible agency; as where the act has been done by a party in a state of somnambulism;<sup>1</sup>

[ \* 285 ] \*or as in the case of the unfortunate person in France, who was executed as a thief on the strength of a number of articles of missing silver having been found in a place to which he alone had access, and which were afterward discovered to have been deposited there by a magpie.<sup>2</sup>

*Forgery of real evidence.*

§ 203. 2°. There is no subject in the whole range of judicial proofs which demands more anxious attention than the forgery of real evidence. It is in some degree analogous to the subornation of personal evidence, being an attempt to pervert and corrupt the nature of things or real objects, and thus force them to speak falsely. The presumption of guilt afforded by the detection of a forgery of real evidence is a different subject, and is based on the maxim, "*Omnia præsumuntur contra spoliatorem*"<sup>3</sup>

a case where part of the evidence against a man charged with murder, consisted in his night-dress having been found stained with blood; a fact which he declared his inability to account for, and which was afterward discovered to have been occasioned by his bedfellow having a bleeding wound, of which the prisoner was not aware.

<sup>1</sup> Cases of this nature have occurred. See Ray's Med. Jurisp. of Insanity, §§ 295, 297; Matth. de Criminib. Prolegomena, ch. 2, § 13; and Taylor, Med. Jurisp. 789, 790, 4th Ed. Two men who had been hunting during the day slept together at night. One of them was renewing the chase in his dream, and imagining himself present at the death of a stag, cried out, "I'll kill him, I'll kill him!" The other, awakened by the noise, got out of the bed, and by the light of the moon beheld the sleeper give several stabs with a knife on that part of it which his companion had just quitted. Hervey's Meditations on the Night, note 35. Suppose a blow given in this way had proved fatal, and that the two men had been shown to have quarreled before retiring to rest!

<sup>2</sup> 3 Benth. Jud. Ev. 49; Bonnier, Traité des Preuves, § 647.

<sup>3</sup> 3 Benth. Jud. Ev. 50.

<sup>4</sup> *Infra*, bk. 3, pt. 2, ch. 2.

—its weight as an infirmative hypothesis respecting real evidence in general, being all that comes in question at present.

§ 204. Forgery of real evidence may have its origin in any of the following causes: 1. Self-exculpation. 2. The malicious intention of injuring the accused, or others. 3. Sport, or with the view of effecting some moral end.

1. *Self-exculpatory forgery — Suspected person innocent in toto — By innocent person to avert suspicion.*

§ 205. 1. Self-exculpatory forgery of real evidence. \*An excellent instance of the danger to be apprehended from this source is given by Sir [\* 286] Matthew Hale, in a passage which is very frequently quoted. After observing that the recent and unexplained possession of stolen property raises a strong presumption of larceny, he tells us of a case tried, as he says, before a very learned and wary judge, where a man was condemned and executed for horse stealing, on the strength of his having been found upon the animal the day it was stolen, but whose innocence was afterward made clear by the confession of the real thief, who acknowledged that, on finding himself closely pursued, he had requested the unfortunate man to walk his horse for him while he turned aside upon a necessary occasion, and thus escaped.<sup>1</sup> This species of forgery, however, is not confined to criminals. It sometimes happens that an innocent man, sensible that, though guiltless, appearances are against him,

<sup>1</sup> 2 Hale, P. C. 289. A similar conviction occurred in Surrey in 1827, but the fatal result was averted; *R. v. Gill*, Wills, Circ. Evid. 54, 3rd Ed. See, also, the case of *John Jennings*, Theor. of Presumptive Proof, App., case 1; and that of *Du Moulin*, Chambers's Edinb. Journ. for Oct. 28, 1837.

and not duly weighing the danger of being detected in clandestine attempts to stifle proof, endeavors to get rid of real evidence in such a way as to avert suspicion from himself, or even turn it on some one else. An extremely apt illustration is to be found in the Arabian Nights' Entertainments; where the body of a man who had died by accident in the house of a neighbor, was conveyed by him, under the apprehension of suspicion of murder in the event of the corpse being found in his house, into the house of another neighbor; who, finding it there, and acting under the influence of a similar apprehension, in like manner transmitted it to a third; who, in his turn, shifted the [\* 287] \*possession of the corpse to a fourth, with whom it was found by the officers of justice.

*Malicious—Instances.*

§ 206. 2. The forgery of real evidence may have been effected with the malicious purpose of bringing down suffering on an innocent individual. The most obvious instance is to be found in a case probably of more frequent occurrence than is usually supposed—namely, where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with the view of exciting a suspicion of larceny against him;<sup>1</sup> and a suspicion of murder may be raised by secreting a bloody

<sup>1</sup> 3 Benth. Jud. Ev. 36. The story alluded to is the well-known one of the little hunchback.

<sup>2</sup> In the preface to Mr. Arbuthnot's Reports of the Court of Foujdaree Udaltut of Madras, Madras, 1851, p. xlii, is the following passage:—“In the annals of criminal justice in this country, instances of this species of forgery of real evidence are far from uncommon, it being a matter of notoriety that the clandestine placing of articles in the houses of accused persons, with a view to facilitate their conviction of a crime charged, is frequently resorted to by the native officers of police; while the production by the police from the houses of accused persons of articles, which are really their property, but are alleged to have been obtained by theft or robbery is still more common.”



weapon in the like manner.<sup>1</sup> In the case of *Le Brun*,<sup>2</sup> who was accused of having murdered a lady of rank to whom he was servant, the officers of justice were charged by his advocates with having altered a common key, found in his possession, into a master key, in order to make it appear at the trial that he had a facility for committing the murder which he really did not possess. "Another remarkable example," says Mr. Arbuthnot, in the preface to his Reports of the Foujdaree Udalt of Madras,<sup>3</sup> "is related in a Report recently published on the Wellicade Jail at Colombo in Ceylon. A man named Sellapa Chitty, of the class termed Nattacotie, reported wealthy, and largely engaged \*in trade, charged [ \* 288 ] his neighbor and rival in business with causing the death of a Malabar Cooly by burning and otherwise ill-treating him; whereas it was found that the man had died a natural death, and that the prisoner, together with a relative and servant, had applied fire to several parts of the body, and deposited it on the premises of the accused; after which he gave notice to the police, and charged the innocent party with the murder. The case seemed clear, and the accused would have been tried on the capital charge, had not the medical gentleman on the inquest observed the unusual appearance of the burnt parts, and finally discovered that the injuries had all been inflicted on the body *after death*." The numerous cases that have occurred of persons inflicting wounds, often of a serious nature, on themselves, with the view of attaining some end<sup>4</sup>—in some instances for the purpose of enabling

<sup>1</sup> Theory of Presumptive Proof, App., case 10.

<sup>2</sup> 3 Perth. Jud. Ev. 60.

<sup>3</sup> Pages xli, xlii.

<sup>4</sup> See Tayl. Med. Jurisp. 254 *et seq.*, 3rd Ed.; Beck's Med. Jurisp. 32 *et seq.* 7th Ed.

them to accuse hated individuals'—should induce tribunals to be more on their guard against the forgery of real evidence than they commonly are. And, as though no limit could be assigned to human wickedness, it is said that even suicide has been committed with a like view.<sup>2</sup> The following application of this kind of forgery is likely to be made in countries, where the legitimate principles of evidence are either not well understood or not duly observed. We allude to the artifice of sending to the person whom it is desired to injure letters, in which either the mode of committing some [\* 289] \*crime is discussed, or allusion is made to a supposed crime already committed; and then procuring his arrest under such circumstances that the document may be found in his possession. *E. g.*, “On such an occasion” (naming it), “my dear friend, you failed in your enterprise;” an enterprise (describing it by allusion) of theft, robbery, murder, treason: “on such a day, do so and so, and you will succeed.”<sup>3</sup> “In this way,” observes Bentham, “so far as possession of criminative written evidence amounts to crimination, it is in the power of any one man to make circumstantial evidence of criminality in any shape, against any other.”<sup>4</sup>

<sup>1</sup> *Tayl. in loc. cit.* In the Times Newspaper for January 30, 1847, will be found the case of a girl at Reading who, enraged against a man for having ceased to live with her, cut her throat severely, and then charged him with having attempted to murder her.

<sup>2</sup> We have somewhere read a case of that kind; and believe also that the French Jacobins were accused of having slain, with his consent, one of their number, in order to throw on the Royalists the imputation of having murdered him as a political enemy.

<sup>3</sup> 3 Benth. Jud. Ev. 44.

<sup>4</sup> *Id.*

*With double object — By force.*

§ 207. It sometimes happens that real evidence is forged with the double motive of self-exculpation, and of inducing suspicion on a hated individual.<sup>1</sup> And, lastly, it is to be observed, that this species of forgery may be accomplished by force as well as by fraud: *e. g.*, three men unite in a conspiracy against an innocent person; one lays hold of his hands, another puts into his pocket an article of stolen property, which the third, running up as if by accident during the scuffle, finds there and denounces him to justice as a thief.<sup>2</sup>

*3. In sport, or for a moral end.*

§ 208. 3. Forgery of real evidence committed either in sport or with the view of effecting some moral end. As an instance of this may be cited the story of the patriarch Joseph, who, with a view of creating alarm and remorse in the minds of his guilty brothers for their conduct toward him in early life, caused a silver cup to be privately hid in one of their sacks, and after they had gone some distance on their journey, had them arrested and brought back as thieves.<sup>3</sup>

*Lawful action of the accused.*

\* § 209. The other infirmative hypothesis affecting real evidence remains to be noticed; namely, [ \* 290 ] that the apparently criminative fact may have been created by the accused in the furtherance of some lawful,

<sup>1</sup> See the case of the Flemish parson in 5 Causes Célèbres, 442, Ed. Richer, Amsterd. 1773.

<sup>2</sup> 3 Benth. Jud. Ev. 39.

<sup>3</sup> Genesis, xliv. 2 *et seq.* See 6 Benth. Jud. Ev. 37, 52.

or even laudable, design. This is best exemplified by those cases of larceny, where stolen property is found in the possession of a person who, knowing or suspecting it to have been stolen, takes possession of it with the view of seeking the true owner in order to restore it, or of bringing the thief to justice; but, before this can be accomplished, becomes himself the object of suspicion, in consequence of the stolen property being seen in his possession, or of false information being laid against him.<sup>1</sup> In cases of suspected murder, also, stains of blood on the person or dress of the accused or suspected party, may have been produced by many causes,<sup>2</sup> *e. g.*, the slaughter of an animal, an accidental bleeding from the nose,<sup>3</sup> a surgical operation,<sup>4</sup> etc.

*Real evidence fallacious as to quality of crime.*

§ 210. Real evidence, while truly evidentiary of guilt in general, may be fallacious as to the *quality* of the crime. The recent possession of stolen property, for instance, standing alone, is deemed presumptive evidence of larceny, not of the accused having received the goods with a guilty knowledge of their having been stolen;<sup>5</sup>

[ \* 291 ] \*and there can be little doubt that many persons have been convicted and punished for the

<sup>1</sup> The author has an impression of having seen a case on circuit, where a peddler got drunk in a public-house, and a person present took possession of his pack with the view of returning it to him when sober, and was rewarded for his charity by an indictment for larceny.

<sup>2</sup> Quintil. lib. 5, c. 12.

<sup>3</sup> Id. lib. 5, c. 9.

<sup>4</sup> In the case of *William Shaw*, executed at Edinburgh in 1721 for the supposed murder of his daughter who had committed suicide, one of the facts which pressed against him was that his shirt was bloody, which was however caused by his having bled himself some days before, and the bandage becoming untied. *Theory of Pres. Proof*, App., case 8.

<sup>5</sup> *R. v. Densley*, 6 C. & P. 399; *R. v. Oddy*, 2 Den. C. C. 273, per Alderson, B. See *Reg. v. Langmead*, 1 Leigh & C. 427, 439.

former offense, whose guilt consisted in the latter; while on the other hand justice has often failed the other way — a party guilty of receiving stolen property having been erroneously indicted for larceny.<sup>1</sup> This imperfection in our criminal law was remedied by the 11 & 12 Vict. c. 46, s. 3, and 24 & 25 Vict. c. 96, s. 92, which allow counts for larceny to be joined with counts for receiving goods, knowing them to have been stolen.<sup>2</sup> So where a person is found dead and plundered of his property, the subsequent possession of a portion of it may induce a suspicion of murder, against a party whose real crime was robbery.<sup>3</sup>

*Presumption of larceny from possession of stolen property — Sometimes shifts the burden of proof — Possession must be recent.*

§ 211. There is one species of real evidence which deserves a more particular consideration, namely, the presumption of larceny, arising from possession by the accused of the whole or some portion of the stolen property. Not only is this presumptive evidence of delinquency when coupled with other circumstances; but even when standing alone it will in many cases raise a presumption of guilt, sufficient to cast on the accused the onus of showing that he came honestly by the stolen property, and in default of his so doing, it will warrant the jury in convicting him as the thief. This presumption is not only subject to the infirmative hypotheses attending real evidence in general; but, from its constant occurrence, and the obvious danger of acting indiscrimi-

<sup>1</sup> See *R. v. Collier*, 4 Jurist, 703.

<sup>2</sup> See, also, 14 & 15 Vict. c. 100, s. 12.

<sup>3</sup> See *R. v. Downing*, Wills, Circ. Evid. 137, 3rd. Ed.

nately upon it, it has, as it were, attracted the attention of judges, who have endeavored to impose some practical limits to its operation, where it constitutes the *only* evidence against the accused. (And, first, it is clearly established that in order to put the accused on \*his [ \* 292 ] defense, his possession of the stolen property must be *recent*;<sup>1</sup> although what shall be deemed recent possession must be determined by the nature of the articles stolen — *i. e.*, whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused would be likely, from his situation in life, or vocation, to become innocently possessed.<sup>2</sup> A poor man, for instance, might fairly be called to account for the possession of articles of plate, jewels, or rare and curious books, after a much longer time than if the property found on him had consisted of clothes, articles of food suitable to his condition, tools proper for his trade, &c. In the first reported case on this subject,<sup>3</sup> Bayley, J., directed an acquittal, because the only evidence against the prisoner was that the stolen goods (the nature of which is not stated in the report) were found in his possession after a lapse of *sixteen* months from the time of the loss. Where, however, seventy sheep were put on a common on the 18th of June, but not missed till November, and the prisoner was in possession of four of them in October, and of nineteen more on the 23rd of November, the same judge allowed evidence of the possession of both to be given. In the subsequent case of *R. v. Adams*,<sup>4</sup> where the pris-

<sup>1</sup> 2 Stark. Ev. 614, 3rd Ed.; 5 East, P. C. 657; *R. v. Cockin*, 2 Lew. C. C. 235; and the cases cited in the following notes.

<sup>2</sup> 2 Russ. on Crimes, 338, 4th Ed.; *R. v. Partridge*, 7 C. & P. 551; *R. v. Cockin*, 2 Lew. C. C. 235, n.

<sup>3</sup> *Anon.*, 2 C. & P. 459.

<sup>4</sup> *R. v. Dewhurst*, 2 Stark. Ev. 614, note (e), 3rd Ed.

<sup>5</sup> 3 C. & P. 600.

oner was indicted for stealing an axe, a saw, and a mattock, and the whole evidence was that they were found in his possession *three* months after they were *missed*, Parke, J., directed an acquittal. And in a more recent case of *R. v. Cruttenden*,<sup>1</sup> where a shovel which had been stolen was found about *six* or *seven* months after the theft in the house of the prisoner, who was not then at home,

\*Gurney, B., held that, on this evidence alone, the prisoner ought not to be called on for his [ \* 293 ] defense. In *R. v. Partridge*,<sup>2</sup> however, where the prisoner was indicted for stealing two “ends” of woollen cloth (*i. e.*, pieces of cloth consisting of about twenty yards each), which were found in his possession about *two* months after they were *missed*; on its being objected that too long a time had elapsed, Patteson, J., overruled the objection, and the prisoner was convicted. Afterward, in *R. v. Hewlett*,<sup>3</sup> a prisoner was indicted for stealing three sheets, the only evidence against him being, that they were found on his bed in his house three calendar months after the theft. On this it was objected by his counsel, on the authority of *R. v. Adams*, that the prisoner ought not to be called on for his defense; but Wightman, J., said, that it seemed to him impossible to lay down any definite rule as to the precise time which was too great to call on a prisoner to give an account of the possession of stolen property; and that although the evidence in the actual case was very slight, it must be left to the jury to consider what weight they would attach to it. The prisoner was acquitted. In *R. v. Cooper*,<sup>4</sup> where a mare which had been lost on the

<sup>1</sup> 6 Jur. 267, and MS.: Kent Sp. Ass. 1842.

<sup>2</sup> 7 C. & P. 551.

<sup>3</sup> 3 Russ. on Crimes, 216, 4th Ed.: Salop Sp. Ass. 1843

<sup>4</sup> 3 Car. & K. 318.

17th of December, was found in the possession of the prisoner between the 20th of June and the 22nd of July following, and there was no other evidence against him, Maule, J., held the possession not sufficiently recent to put him on his defense. In dealing with this subject, it is to be remarked that the probability of guilt is increased, by the coincidence in number of the articles stolen with those found in the possession of the accused, the possession of one out of a large number stolen, being more easily attributable to accident or forgery than the possession of all.<sup>1</sup>

*And exclusive.*

[ \* 294 ] \*§ 212. But in order to raise this presumption legitimately, the possession of the stolen property should be *exclusive* as well as recent. The finding it on the person of the accused, for instance, or in a locked-up house or room, or in a box of which he kept the key, would be a fair ground for calling on him for his defense; but if the articles stolen were only found lying in a house or room, in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access, no definite presumption of his guilt could be made.<sup>2</sup> An exception has been said to exist where the accused is the occupier of the house in which stolen property is found, who, it is argued, must be presumed to have such control over it as to prevent any thing coming in or being taken out without his sanction. As a foundation for *civil* responsibility this reasoning may be correct; but to conclude the master of a house guilty of *felony*, on

<sup>1</sup> 2 Russ. on Crimes, 339, note (r), 4th Ed.; per Erle, J., *R. v. Brown*, MS.: Kent Sum. Ass. 1851.

<sup>2</sup> 2 Stark. Ev. 614, 3rd Ed., note (g); Rose. Crim. Ev. 19, 4th Ed.



the double presumption, first, that stolen goods found in the house were placed there by him or with his connivance; and, secondly, supposing they even were, that he was the thief who stole them, there being no corroborating circumstances, is certainly treading on the very verge of artificial conviction.<sup>1</sup>

*Carried too far in practice.*

§ 213. Indeed, there can be no doubt that, in practice, the legitimate limits of the presumption under consideration are sometimes overstepped. "Nothing," remarks Bentham, "can be more persuasive than the circumstance \*of possession commonly is, when corroborated by other criminative circumstances; [ \* 295 ] nothing more inconclusive, supposing it to stand alone. Receptacles may be contained one within the other, as in the case of a nest of boxes: the jewel in a case; the case in a box; the box in a bureau; the bureau in a closet; the closet in a room; the room in a house; the house in a field. Possession of the jewel, *actual* possession, may thus belong to half-a-dozen different persons at the same time: and as to *antecedent* possession, the number of possible successive possessors is manifestly beyond all limit." \* It is in its character of a *circumstance* joined with others of a criminative nature, that the fact of possession becomes really valuable and entitled to consideration, whether it be ancient or recent, joint or exclusive. But, whatever the nature of the evidence, the jury must be

<sup>1</sup> "Il y aurait injustice flagrante, à réputer complice d'un vol celui chez qui l'objet volé serait trouvé, ainsi qu'on le faisait à Rome pour la réparation civile du délit. Présumer la culpabilité, à raison des circonstances qui peuvent n'être que fortuites, c'est là une marche grossière, qui appartient à l'enfance du droit pénal." Bonnier, *Traité des Preuves*, § 675. See, also, Hume's *Crim. Law of Scotland*, vol. 1, p. 111.

<sup>2</sup> 3 Benth. *Jud. Ev.* 39, 40.

morally convinced of the guilt of the accused, who is not to be condemned on any artificial presumption or technical reasoning, however true and just in the abstract.

*Explanation of possession by the accused.*

§ 214. When the case against the accused is sufficiently strong to warrant the calling on him for his defense, the credit due to any explanation he gives of the way in which the stolen property came into his possession, whether that explanation is supported by evidence or not, is altogether for the consideration of the jury. And here it is necessary to point attention to an important distinction. In *R. v. Crowhurst*,<sup>1</sup> which was an indictment for larceny, Alderson, B., before whom the case was tried, thus directed the jury: "In cases of this nature you should take it as a general principle that, where a man in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling [ \* 296 ] the name of the person from \*whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving the truth lies on him. Suppose, for instance, a person were to charge me with stealing this watch, and I were to say I bought it from a particular tradesman, whom I name, that is *primâ facie* a reasonable account, and I ought not to be convicted of felony unless it is shown that that account is a false one." This doctrine is confirmed by the cases of *R. v. Smith*<sup>2</sup> and *R. v. Harmer*.<sup>3</sup> The subsequent case of *R. v. Wilson*<sup>4</sup> may at first

<sup>1</sup> 1 Car. & K. 370.

<sup>2</sup> 2 Car. & K. 207.

<sup>3</sup> 2 Cox, Cr. Cas. 487.

<sup>4</sup> 1 Dears. & B. 157; 7 Cox, Cr. Cas. 310.

sight seem at variance with it, but is not in reality; for, although in that case *R. v. Crowhurst* and *R. v. Smith* were cited, the decision of the court turned simply on the question whether the whole evidence taken together was sufficient to justify a conviction. (a)

(a) When property that has been recently stolen is found in the possession of another, it is a strong circumstance to fix guilt upon the person in whose possession it is found, and imposes upon him the burden of showing how he became possessed of it. *Belote v. State*, 36 Miss. 96; *People v. Ah Ki*, 20 Cal. 177; *Jones v. People*, 12 Ill. 259; *People v. Kelly*, 28 Cal. 423; *State v. Gray*, 37 Mo. 463; *Hughes v. State*, 8 Humph. (Tenn.) 75; *State v. Kinsman*, 7 Rich. (S. C.) 497; *State v. Adams*, 14 Ala. 486; *Knickerbocker v. People*, 43 N. Y. 177; *Mondragan v. State*, 33 Tex. 480; *State v. Turner*, 65 N. C. 592; *State v. Bruin*, 34 Mo. 547; *Com. v. Bell*, 102 Mass. 163; *State v. Wohlman*, 34 Mo. 487; *People v. Mahoney*, 18 Cal. 186; *State v. Staples*, 4 N. H. 113; *Johnson v. State*, 47 Ala. 621; *May v. State*, 35 Ind. 409. But in the absence of other evidence, possession of the goods does not raise a presumption even that the possessor of the goods is guilty of the larceny; for whatever presumption might be raised from such possession is completely overcome and rebutted by those other presumptions raised by the law, that possession of property is honestly acquired, and that innocence is to be presumed until guilt is proved; and the possession must be of such a character as fairly to raise a presumption of guilt or it will not be sufficient to put a prisoner upon proof as to the means by which he acquired possession. That is, unless the property is shown to have been stolen, and the possession is such as to fairly indicate a guilty connection with the crime, and is attended by such circumstances as warrant a reasonable suspicion, he will not be required to explain his possession. *Billard v. State*, 30 Tex. 367; *State v. Brady*, 27 Iowa, 226; *Curtis v. State*, 6 Cold. (Tenn.) 9; *Head v. State*, 25 Wis. 421; *State v. Taylor*, 25 Iowa, 273.

Thus in *Davis v. People*, 1 Parker's Cr. Rep. (N. Y.) 447, it was held that mere possession of goods known to be the proceeds of a burglary, did not raise a presumption even that the possessor was guilty of the burglary. In *Knickerbocker v. People*, 57 Barb. (N. Y.) 365, affirmed Ct. of App. 43 N. Y. 177, the rule in reference to the effect of such evidence was laid down thus: "Although the mere possession by a person of goods which were stolen on the occasion of a burglary, without any other evidence indicative of guilt, is not *prima facie* evidence that such person committed the burglary; yet, when in addition to such possession, soon after the burglary, there is evidence that the prisoner was in the vicinity of the place where the burglary was committed just prior to the act, and left there under circumstances of some suspicion, and that he prevaricated in reference to his possession of the property, that, *unexplained*, is *prima facie* evidence of his guilt, and will sustain a conviction for the burglary."

But, as it is presumed that every person who has come into the possession of property can explain his possession, and show how he acquired it, if he fails to do so, the fact of his failure, coupled with proof that the goods were stolen, is a circumstance so strongly indicative of guilt as to justify a conviction. But if he explains his possession, and his explanation is not improbable or unreasonable, the prosecution is bound to show its falsity. The mere fact that he claims to have obtained the property by purchase or otherwise of some person whose name he gives, is not enough to exculpate him. He must show that the person whose name he has given really exists, and such facts and circumstances as render it possible that his explanation is correct. *State v. Brown*, 25 Iowa, 561. To allow persons to escape who are placed in such a suspicious position, upon their mere *ipse dixit* that they purchased the goods of some person whose name or whereabouts they are unable to give, and without calling such person, or introducing evidence in reference to their own character or tending to show their honesty in the transaction, would open the door for the escape of criminals to such an extent as to render their conviction next to impossible.

Therefore the prosecution in such cases are only required to show that the goods were stolen, and that they were found in the prisoner's possession, to shift the burden upon him of showing how he became possessed of them. The circumstances under which the goods were found, the character of the prisoner, his attempts to conceal them, in fact, any thing connected with his possession that has a tendency to show that his dealing with the property was such as to show guilt on the one hand or innocence on the other, is proper to be shown, and often furnishes the surest test of the guilt or innocence of the accused.

If a person in whose custody stolen goods are found is shown to be exposing them openly in the vicinity where they were stolen, or is dealing with the property as an honest owner would deal with it, this is a strong circumstance in favor of the honesty of his possession. But if, on the other hand, the property is concealed, or he has sold it for a sum very much below its market value, or is found dealing with it in such a manner as is inconsistent with an honest possession, these facts tend strongly to establish his guilt. Indeed, in all cases, the circumstances under which the goods were found, the manner in which the prisoner dealt with them, his character, are all material facts to be considered by the jury. If he introduces evidence tending to show that his possession of the property is not guilty, and such as raises a fair doubt upon the question, the prosecution is bound to overcome the doubt, or fail of a conviction. The prisoner need not explain his possession beyond a reasonable doubt; it is enough if a fair doubt is thus raised, if his explanation is *reasonable* and *probable*, even though its truth is not satisfactorily established.

The rule seems to be that, where a person is found in the possession of goods recently stolen, proof of the fact that they were stolen, and found in the respondent's possession, is enough to charge him with responsibility for the crime, unless he gives a reasonable explanation of his possession consistent with his innocence; *Regina v. Harmer*, 3 Cox's Cr. Cas. 487; *Regina v. Crow-*

hurst, 1 C. & K. 370; *Regina v. Debley*, 2 C. & K. 818; *Rex v. Burdett*, 4 B. & Ald. 149; *Regina v. Smith*, 2 C. & K. 217; Wills on Circumstantial Ev. 54; but if he gives a reasonable explanation of his possession, by giving the name and residence of the person of whom he claims to have bought the goods, and shows that such a person really lives in the place named, or was there at the time when the purchase is alleged to have been made by him, or the possession of the goods delivered to him, and such person is reasonably accessible to the prosecution, the prosecution is then bound to show that his explanation is false. *Reg. v. Smith*, 2 C. & K. 217.

Thus in *Regina v. Smith*, *ante*, the respondent was indicted for stealing a piece of wood which was found in his possession five days after it was stolen, and he stated that he had obtained it from a person whose name he gave, who lived only two miles away, it was held that the prosecution were bound to show that his account of the manner in which he acquired the possession of the goods was false. The account must not only be reasonable, but it must be such that the prosecution can find the party named, and the question as to whether it is such a reasonable account as to enable the prosecution to find the person named, is for the jury. *Regina v. Hughes*, Cox's C. C. 176.

Mr. Wills in his excellent treatise on Circumstantial Evidence, in referring to the rule in such cases, says, "But these refinements are not strictly followed in practice, and indeed are not always easily capable of application," and he cites the case of *Reg. v. Wilson*, 7 Cox's C. C. 310, where the respondent was indicted for stealing some articles of dress, and the evidence was that he was in possession of the stolen property *recently* after it was stolen; that he sold it openly in a public house and on his arrest stated to the constable that C. and D. brought the things to his house, and that one W., who was at his house, would say that it was so, and the constable knew all of the persons, but none of them were called, the prisoner being convicted, it was held that the conviction was good.

If his account is unreasonable or improbable, or if he has given conflicting or different accounts of his possession of the goods, he will not be relieved from the presumption of guilt raised by the possession of the goods. *Reg. v. Harmer*, *ante*; *Reg. v. Crowhurst*, *ante*; *Knickerbocker v. People*, 43 N. Y. 177; *State v. Brown*, 25 Iowa, 561. The possession of stolen goods not according to the circumstances and habit of the life of the party charged, raises a strong presumption against him, calling for a satisfactory explanation from him. *Gilbert's Ev.* 898; *McNally's Ev.* 579. But mere possession of such goods is not enough to secure the conviction of the person for larceny, unless they are shown to have been actually stolen from some person whose name is known, and the prisoner, in the absence of such proof, is not required in any manner to explain his possession. Such explanation is only required when the fact of larceny is established. 4 Blackstone's Com. 352; 2 Hale's P. C. 290; *McNally's Ev.* 580; *State v. Taylor*, 25 Iowa, 273; *Billard v. State*, 30 Tex. 367; *State v. Brady*, 27 Iowa, 126; *Curtis v. State*, 6 Cold. (Tenn.) 9; *Sartorius v. State*, 24 Miss. 602; *People v. Chambers*, 18 Cal. 382; *People v.*

Ah Ki, 20 id. 177; Belote v. State, 36 Miss. 96; People v. Cuniff, 2 Penn. St. 586; State v. McGowan, 1 S. C. 14.

In Lewis v. State, 4 Kan. 296, it appeared that the respondent and three others were in possession of a farm upon which they had squatted, and from which they had jointly cut and stacked the hay growing on the place. In these stacks they had left large cavities in which the stolen goods were found. Three of the persons fled when they ascertained that they were suspected of the larceny, but the respondent was apprehended. The court held that the finding of the goods upon the premises, under these circumstances, was sufficient to raise a presumption of the defendant's guilt.

The character of the goods is also proper to be considered, as a wide distinction arises between the possession of goods readily transferred from one to another, and those which are bulky and difficult of transportation, and this has an important bearing upon the question as to whether the possession is sufficiently recent after the theft to warrant the presumption of guilt. In the case of articles readily passed from one to another, the presumption arising from possession grows weaker according to the ratio of its remoteness in point of time, from the original criminal taking. State v. Williams, 9 Ired. (N. C.) 140; Com. v. Doane, 1 Cush. (Mass.) 5; Warren v. State, 1 Iowa, 106; Sloan v. People, 47 Ill. 76. But in the case of bulky property, difficult of removal, the fact of possession is regarded as strong evidence even though a considerable time has elapsed. Jones v. State, 30 Miss. 653.

In Warren v. State, 1 Iowa, 106, it was held that the finding of stolen property on the premises of the respondent eighteen months after the offense was committed, was so remote as not to afford even *prima facie* evidence of guilt; and the same was held in Sloan v. The People, 47 Ill. 76. In State v. Kinman, 7 Rich. (S. C.) 497, it was held that possession in one State of a slave that had been stolen five months before, was sufficiently recent to impose upon the respondent the duty of explaining his possession to avoid conviction. See, also, Partridge's Case, 7 C. & P. 557. In Gregory v. Richards, 8 Jones (N. C.), 443, it was held that the possession must be so recent as to render it improbable that the prisoner acquired possession of the property in any other way, but this is by no means the test, nor is it the rule even in North Carolina, for in a recent case, State v. Turner, 65 N. C. 592, it was held that what is a recent possession, calling for an explanation from the respondent, as well as the reasonableness of the explanation, is a question of fact for the jury in view of all the facts and circumstances of the case. See, also, to the same effect, Price v. State, 13 Gratt. (Va.) 846; May v. State, 35 Ind. 409; Unger v. State, 42 Miss. 642; Com. v. Bell, 102 Mass. 163; Knickerbocker v. People, 43 N.Y. 177; also S. C., 57 Barb. 572. In State v. Bennett, Const. Rep. (S. C.) 692, it was held that the finding of goods in the possession of the respondent two months after the larceny, was a recent possession. In an Anonymous Case, 2 C. & P. 459, sixteen months was held not recent. In Rex v. Dewhurst, 2 Starkie's Ev. 450, six months was held to be recent. Thus, it will be seen that the question as to what is such a recent possession as to call upon the defendant to explain his possession, is necessarily a question in reference to which no definite rule can be given, but

that must necessarily depend upon the peculiar circumstances of each case. But it seems to be settled that in the absence of other proof than that of the larceny, the mere possession of such property sixteen months after the crime was committed, is not *prima facie* evidence, nor even such evidence as, in the language of some of the cases, warrants even a suspicion of guilt. *Hunt v. Com.*, 13 Gratt. 757; *Anonymous*, 2 C. & P. 459; *Warren v. State*, 1 Iowa, 106; *Sloan v. People*, 47 Ill. 76. But it must not be understood by this that possession of stolen goods after sixteen months, or whatever other longer period has elapsed, may not afford some evidence of the respondent's guilt. Of itself, it is not enough to throw upon him the burden of explaining his possession, but when the property is dealt with by the respondent in such a way as an honest owner would not deal with it, *State v. Smith*, 2 Ired. (N. C.) 102; or if, when the prisoner is charged with the offense, he gives an unreasonable account of his possession; or when he has given conflicting accounts thereof, the fact that the property was found in his possession, may be considered by the jury, even though it cannot be regarded as recent, and is to be given weight, that is, is to be regarded as affording a strong or weak presumption of guilt in proportion to the length of time that has elapsed between the taking and the finding, and the force given to it by the additional facts and circumstances in the case. *State v. Jones*, 3 Dev. & Bat. (N. C.) 122; *Com. v. Doane*, 1 Cush. (Mass.) 5; *State v. Williams*, 9 Ired. (N. C.) 140.

In this country the practice is to receive such evidence, however remote in point of time from the crime itself; *State v. Williams*, *ante*; *Garcia v. State*, 26 Tex. 209; *Crilley v. State*, 20 Wis. 231; *State v. Shaw*, 4 Jones (N. C.), 446; but, in the absence of other proof giving force to the fact and reviving the presumption, the jury are always to be instructed that the evidence is very weak and not sufficient to call for any explanation from the prisoner, because it does not afford *prima facie* evidence of guilt. But, otherwise, when the proof is such as to render possession under the circumstances strongly suspicious, or, in other words, so strong as to overcome the presumption that his possession is honest. *State v. Williams*, *ante*; *State v. Brady*, 27 Iowa, 126; *Curtis v. State*, 6 Cold. (Tenn.) 9; *Com. v. Doane*, 1 Cush. (Mass.) 5; *Warren v. State*, 1 Iowa, 106; *Sloan v. People*, 47 Ill. 76; *Watson v. State*, 36 Miss. 793; *Billard v. State*, 30 Tex. 367. But when the goods are found in the recent possession of the respondent, and the larceny is proved, a *prima facie* case is made on the part of the prosecution that calls for an explanation from the prisoner of his possession of the property, or in the absence of it, a conviction will be upheld; *Jones v. State*, 30 Miss. 653; *Belate v. State*, 36 id. 96; *People v. Ah Ki*, 20 Cal. 177; *People v. Cuniff*, 2 Parker's Cr. (N. Y.) 586; *Warren v. State*, 1 Iowa, 106; *Sloan v. People*, 47 Ill. 76; *State v. Williams*, 9 Ired. (N. C.) 140; *Com. v. Doane*, *ante*; *State v. Kinman*, 7 Rich. (S. C.) 497; *State v. Adams*, 14 Ala. 486; *Walker v. State*, 26 Ga. 633; *Watson v. State*, 36 Miss. 793; *State v. Floyd*, 15 Mo. 349; *State v. Wolf*, 15 id. 168; *People v. Chambers*, 18 Cal. 382; *Sartorius v. State*, 24 Miss. 602; *Gregory v. Richards*, 8 Jones (N. C.), 443; *State v. Johnson*, 1 Wins. (N. C.) 235; *People v. Antonio*, 37 Cal. 404; *State v. Merrick*, 1 App. (Me.) 398; *State v. Bennett*, 3 Brev. (S. S.) 514; *Conkwright v. People*, 35 Ill. 204; *Com. v. Stebbins*, 8 Gray

(Mass.), 492; *State v. Jones*, 3 Dev. & Bat. 122; *State v. Smith*, 2 Ired. (N. C.) 102; *Simpson v. State*, 4 Humph. (Tenn.) 456; *Fisher v. State*, 46 Ala. 717; *Price v. State*, 21 Gratt. (Va.) 846; *Unger v. State*, 42 Miss. 442; *Knickerbocker v. People*, 43 N. Y. 177; *Mandragan v. State*, 33 Tex. 480; *State v. Turner*, 65 N. C. 592; *State v. Bruin*, 34 Mo. 547; *People v. Gassaway*, 23 Cal. 51; *Com. v. Bell*, 102 Mass. 163; *State v. Wohlman*, 34 Mo. 487; *People v. Mahoney*, 18 Cal. 80; *State v. Staples*, 4 N. H. 113; *Johnson v. State*, 47 Ala. 62; *Com. v. Howe*, 2 Allen (Mass.), 153; *Com. v. Millard*, 1 Mass. 6; *State v. Brewster*, 7 Vt. 122; *State v. Weston*, 9 Conn. 527; *Penn. v. Myers*, Addis. (Penn.) 321; *State v. Bennett*, Const. Rep. (S. C.) 692; *Com. v. Riggs*, 14 Gray (Mass.), 374; *Yarborough v. State*, 41 Ala. 405; *State v. Taylor*, 25 Iowa, 272; *State v. McGowan*, 1 S. C. 14; *State v. Brown*, 25 Iowa, 561; *Lewis v. State*, 4 Kan. 296; and where the presumption fairly arises, the possession of a part of goods stolen upon a particular occasion, raises a presumption that he stole the whole; *Com. v. Howe*, 2 Allen (Mass.), 153; *Com. v. Millard*, 1 Mass. 6; but the presumption thus raised is not conclusive; it is not a legal presumption, but a mere presumption of fact; *State v. Hodge*, 50 N. H. 570; *Graves v. State*, 12 Wis. 591; *State v. Arnold*, 12 Iowa, 479; *Wilcox v. State*, 3 Heisk. (Tenn.) 110; *Conkwright v. People*, 35 Ill. 204; *State v. Bennett*, *ante*; *People v. Antonio*, *ante*; *State v. Merrick*, *ante*; which may be overcome by any proof tending to raise a reasonable doubt; *Walker v. State*, 26 Ga. 633; *Hall v. State*, 8 Ired. 489; *Belate v. State*, 36 Miss. 96; *People v. Ah. Ki*, 20 Cal. 177; thus, the prisoner may show what he said when arrested, or first accused of the crime, in explanation of his possession as a part of the *res gestæ*; *Walker v. State*, 26 Ga. 633; or that he is a man of property, as bearing upon the question; *Com. v. Stebbins*, 8 Gray (Mass.), 492; or that he came into possession of the property subsequent to the larceny; *Head v. State*, 25 Wis. 421; or any fact or circumstance tending to explain his possession, and as to what is a reasonable explanation the jury are to judge. *State v. Adams*, 14 Ala. 436.

The prisoner is not bound to show that his possession is lawful, nor is he bound to show that he acquired it honestly beyond a reasonable doubt. It is sufficient if his explanation is such as, in view of all the evidence, to leave a reasonable doubt in the minds of the jury as to his guilt, and it is error to instruct a jury that they must convict unless the prisoner shows how he came by the property; *Hall v. State*, 8 Ired. 439; *Belate v. State*, 36 Miss. 96; *People v. Ah. Ki*, 20 Cal. 177; *People v. Kelly*, 28 id. 423; *State v. Gray*, 37 Mo. 463; *Jones v. People*, 12 Ill. 259; *Hughes v. State*, 8 Humph. (Tenn.) 75; and in order to amount to *prima facie* proof, the property must be shown to be in his exclusive possession. It must be shown to be under his control. The mere fact that property is found upon his premises, to which others have free access, and not under circumstances such as *prima facie* exclude the idea that it might have been placed there by others, is not enough, it must really be in his custody. But in *State v. Johnson*, 1 Wins. (N. C.) 738, it was held that where property that had been stolen was found in a house exclusively occupied by the defendants, that it was in the possession of the defendants so as to warrant a conviction for its larceny.



So, the prosecution to strengthen the presumption may show that other stolen goods were found in his custody at the same time. *Com. v. Riggs*, 14 Gray (Mass.), 376; *Yarborough v. State*, 41 Ala. 405; or that he has given conflicting accounts of the matter. *State v. Jones*, 3 Dev. & Bat. 122; or that he has committed other thefts, even though in other States. *Watson v. State*, 36 Miss. 793. Evidence of other transactions of the prisoner may be given in evidence for the purpose of proving guilty knowledge. *Coleman v. People*, 1 Hun (N. Y.), 596. And evidence may be given to show that the prisoner has made inconsistent statements in reference to collateral matters bearing more or less upon the issue. *Id.* Or that he concealed the goods. *Lewis v. State*, 4 Kan. 296; or that he was in a situation to commit the crime. *Knickerbocker v. People*, 43 N. Y. 177; or that he has dealt with the property in a manner inconsistent with an honest possession. *State v. Brown*, 25 Iowa, 561; *State v. Smith*, 2 Ired. (N. C.) 102.

[ \* 297 ]

## \*PART III.

## DOCUMENTS.

## CHAPTER I.

## DOCUMENTARY EVIDENCE IN GENERAL.

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### *Documents.*

§ 215. The remaining instruments of evidence are DOCUMENTS, under which term are properly included all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus, the wooden scores on which bakers, milkman, &c., indicate by notches the number of loaves of bread or quarts of milk supplied to their customers; the old exchequer tallies,<sup>1</sup> and such like, are documents as much as the most elaborate \*deeds. In some instances, no doubt, the line [ \* 299 ] of demarcation between documentary and real evidence seems faint; as in the case of models or draw-

<sup>1</sup> These tallies were used as acquittances for debts due to the crown, and for some other purposes. A piece of wood, about two feet long, was cut into a particular uneven form, and scored with notches of different sizes to denote different denominations of coin, the largest denoting thousands of pounds; after which came respectively hundreds, tens, and units, of pounds; while shillings and pence were designated by still smaller notches. The wood was then split down the middle, into two parts, so that the cut passed through the notches. One portion was given out to the accountant, &c., which was called the "tally;" the other was kept by the chamberlain, and called the "counter-foil." The irregular form of the tally, together with the natural inequalities in the grain of the wood, rendered fabrication extremely difficult. Tallies having been abolished, and receipts substituted by 23 Geo. 3, c. 82, and 4 & 5 Will. 4, c. 15, those in existence were destroyed as useless. A few have, however, been preserved in the Remembrancer's Office, with a view of which the author has been kindly favored. See further on the subject of these tallies, *Dialogus de Scaccario*, lib. 1, c. 5; *Madd. Hist. Exch.* chap. 23, § 28; *Gilb. Exch.* chap. 9. Tallies are in use in France, and recognized by law there. *Cod. Civil*, Liv. 3, tit. 3, chap. 6, sect. 1, § 3, Art. 1333; *Bonnier, Traité des Preuves*, §§ 614-616, & 335.

ings, which clearly belong to the latter head, but differ from that which we are now considering in this, that they are *actual*, not *symbolical* representations.

*Necessarily come to the cognizance of tribunals through human testimony — How obtained when wanted for evidence — When in possession of the opposite party — When in possession of a third party — Admissibility and construction of to be decided by the judge.*

§ 216. Documents, being inanimate things, necessarily come to the cognizance of tribunals through the medium of human testimony; for which reason some old authors have denominated them *dead* proofs (*probatio mortua*), in contradistinction to witnesses, who are said to be *living* proofs (*probatio viva*).<sup>1</sup> When documents which are wanted for evidence are in the possession of the opposite party, a notice to produce them should be served on him in due time before the trial, when, if he fails to produce them, derivative, or, as it is technically termed, “secondary” evidence of their contents may be given.<sup>2</sup> When they are in the possession of a third party, he should be served with what is called a subpoena duces tecum, *i. e.*, a summons to attend the trial as a witness and bring the documents with him. The person on whom such a subpoena has been served is bound to obey it, so far as attending the trial and bringing the documents with him; but, by analogy to the principles already explained,<sup>3</sup> he will not be compelled to produce them if the disclosure might subject him to crimination, penalty, or forfeiture. So, a party will not be required to produce the muni-

<sup>1</sup> Bract, lib. 5, fol. 400 b; Co. Litt. 6 b.

<sup>2</sup> Bk. 3, pt. 2, ch. 3.

<sup>3</sup> *Suprà*, pt. 1, ch. 1.

ments of title to his estate,<sup>1</sup> nor will his attorney to whose care they have been intrusted;<sup>2</sup> and in either case independent secondary evidence of their contents \*may be given.\* The admissibility of documents in evidence, as well as all preliminary [\* 300] questions of fact on which that admissibility depends,<sup>3</sup> and their legal construction when received, are to be decided by the judge; other questions respecting them are for the jury.

*Secondary significations of "Writing" and "Written Evidence" — Secondary signification of "Instrument."*

§ 217. Although documentary evidence most usually presents itself in a written form, the terms "Writing" and "Written evidence" have obtained in law a secondary and limited signification, in which they are commonly, but not always used, and much confusion has arisen from the ambiguous meanings of these terms. This matter cannot be more clearly explained than in the following passage from one of the most eminent of French jurists. "The force of written proofs consists in this, that men have agreed together to preserve by writing the recollection of things past, and of which they were desirous to establish the remembrance, either as rules for their guidance, or to have therein a lasting proof of the truth of what they write. Thus, agreements are written to preserve the remembrance of what the contracting parties have prescribed for themselves, and erect that which has been agreed

<sup>1</sup> Tayl. Ev. §§ 428, 1318, 4th Ed.

<sup>2</sup> *Hibberd v. Knight*, 2 Exch. 11; *Doe d. Gilbert v. Ross*, 7 M. & W. 102; *Ditcher v. Kenrick*, 1 Car. & P. 171; *Volant v. Soyer*, 13 C. B. 231.

<sup>3</sup> Per Hill. J., *Reg. v. Leatham*, 3 E. & E. 658, 668; and see *infra*, bk. 3, pt. 2, ch. 3.

<sup>4</sup> Bk. 1, pt. 1, § 82, and note (r).

on into a fixed and immutable law for them. So, wills are written to establish the recollection of what a person who had the right to dispose of his property has ordained, and make thereof a rule for his heir and legatees. In like manner are written sentences, decrees, edicts, ordinances, and every thing intended to have the effect of title or of law, &c. \* \* \* The writing preserves unchangeably what is intrusted to it, and expresses the intention of the parties by their own testimony.”<sup>1</sup> Now it is to [ \* 301 ] \*such documents as are here spoken of, that the terms “writing” and “written evidence” are commonly applied in our books.<sup>2</sup> The civilians and canonists appear to have included all such under the general name of “Instruments;”<sup>3</sup> but among us this term is not usually applied to *public* writings. It is not however essential to an instrument that it be the act of two or more parties: it may be unilateral as well as syn-

<sup>1</sup> Domat, Lois Civiles, Part 1, liv. 3, tit. 6, sect. 2. See the original, *suprà*, Intro. pt. 2, § 60. So deeds usually run, “Now this indenture witnesseth, &c.,” and conclude, “In witness whereof, &c.,” and agreements commonly say, “It is hereby agreed, &c.”

<sup>2</sup> The word “writing,” as well as the Norman French “escript,” have been used in this sense from the earliest times; see Litt. sect. 365; Co. Litt. 352 a; 5 Co. 26 a. So in 2 Edw. IV. 3, A. & B. Nota q̃ *Littleton* voile aver pled escript per voy de fait, et voile aver appel’ ceo un fait, come adire, fist un fait de feoffment. Et *Choke* dit, q̃ ã ne poet estre, car il n’est dit un fait, sinon q̃ un livre de cest ust estre fait, p̃ q̃ *Litt.* luy agree a ceo, et dit que il serr’ appel un writing, et let appel’ un escript conteigne q̃ tiel home enfeoffe tiel home.”

<sup>3</sup> “Facilioris probationis causâ etiam conficiuntur *instrumenta*. Quo vocabulo quamvis omnia, quibus causa instruitur, adeoque et testes denotentur: hic tamen *instrumentum* est scriptura, ad rerum gestarum memoriam fidemque confecta. Quia autem vel publica fide nititur illa scriptura, vel privata: hinc et instrumentum est vel *publicum*, vel *privatum*. Itaque *publica* habentur instrumenta, confecta à magistratibus, velutî acta publica, tabulæ censuales, apochæ publicæ, in monimenta publica translata, diplomata, et notitiæ, ex archivo publico depromptæ, etc.” Heinec. ad Pand. pars 4, §§ 126 & 127. See also, Devotus, Inst. Canon. lib. 3, tit. 9, § 20.

allagmatic. Thus, a deed poll, or a will, is an "instrument," as much as the most complicated indenture consisting of any conceivable number of parts.<sup>1</sup>

*Divisions of writings*—1. *Public and Private*—2. *Judicial and Not judicial*—3. *Of record and Not of record*.

§ 218. "Writings" understood in this sense are \*two kinds, "Public" and "Private." Under [ \* 302 ] the former come acts of parliament, judgments and acts of courts, both of voluntary and contentious jurisdiction, proclamations, public books, and the like. They are divided into "Judicial" and "Not judicial;" and also into "Writings of record" and "Writings not of record."<sup>3</sup> (a) Records, says Lord Chief Baron Gil-

<sup>1</sup> "Nec minus ex his definitionibus intelligitur, instrumentis *privatis* accensenda esse—1. *Chirographa*, quæ super negotio *μονοπλε'υρω* conficiuntur. 2. *Syngraphas*, super negotio *διπλε'υρω* scriptas. 3. *Apochas*, quibus sibi solutum fatentur creditores. 4. *Antapochas* (Reversales), quibus debitor se solvisse, et ad hanc præstationem obstrictum esse fatetur. 5. *Epistolas*. 6. *Libros rationum*, et 7. Quasumque alias scripturas privatorum: Heinec. ad Pand. pars 4, § 128.

<sup>2</sup> *Suprà*, note (i); 2 Ph. Ev. 1, 10th Ed.

<sup>3</sup> 2 Ph. Ev. 1, 10th Ed.

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(a) Parol evidence is never admissible to disprove a record of court. Public policy requires that documents of that character should not be attacked, except through such mediums as the law provides for the correction of errors therein. When a copy of such a record is presented in proof, it is final and conclusive upon the parties, and cannot be attacked collaterally; *Davis v. Tallcot*, 12 N. Y. 184; *Rogers v. Moore*, 2 Root (Conn.), 159; *Boyce v. Burt*, 42 Barb. (N. Y.) 339; *Wallace v. Cail*, 24 N. J. 600; *Hoagland v. Schnorr*, 12 Ohio St. 30, nor can any evidence in reference thereto inconsistent therewith be given, as that the christian name of a person named therein is incorrect; *Woodyard v. Threlkeld*, 1 A. K. Marsh. (Ky.) 10; or that parties who, by the record, appear not to have been in court were in court; *State v. Clemons*, 9 Iowa, 534; *Com. v. Slocum*, 14 Gray, 345; nor though an entry therein is void for uncertainty; *Porter v. Byrne*, 10 Ind. 146; nor can the record of any court of record, which had jurisdiction over the matter involved in the record, be disproved, as the record of a justice

bert, "are the memorials of the legislature, and of the king's courts of justice, and are authentic beyond all manner of contradiction:"<sup>1</sup> they are said to be "monu-

<sup>1</sup> Gilb. Ev. 7, 4th Ed. See, also, Plowd. 491; Co. Litt. 260 a; 4 Co. 71 a; Finch, Law, 231; 1 East, 355; 2 B. & Ad. 367.

or probate court; *McFarlane v. Randle*, 41 Miss. 411; *Lamothe v. Lippott*, 40 Mo. 142; *Dolloff v. Hartwell*, 38 Me. 54; *McLean v. Huganne*, 13 Johns. (N. Y.) 184; *Eastman v. Waterman*, 26 Vt. 494; but evidence explanatory of and not inconsistent with the record may be given to give effect to it; *Keve v. Hayes*, 35 N. Y. 361; *Young v. Fuller*, 29 Ala. 464; *Carr v. Emory College*, 32 Ga. 557; *Boyce v. Burt*, *ante*; *Stark v. Fuller*, 42 Penn. St. 320; *Foster v. Wells*, 4 Texas, 101; *Eastman v. Cooper*, 15 Pick. (Mass.) 276; and docket entries may be shown to be incorrect; *Blair v. Hamilton*, 32 Cal. 49; *Clemmer v. State*, 9 Gill. (Md.) 279.

So in cases where it is *clear that it is necessary to prevent manifest injustice*, the effect of a record may be changed or varied by parol, or where a record is palpably fraudulent, it will be corrected upon parol proof. *Steel v. Glass*, 1 Ga. 475; *Lowry v. McMillan*, 8 Penn. St. 157; *Clawson v. Eichelbaum*, 2 Grant (Penn.), 130.

In *Schirmer v. People*, 33 Ill. 276, the court say, "Whether an instrument offered is a record or not is always open to inquiry, and it may be shown to be forged or altered. And if words have been struck out of a record, so as to render it erroneous, witnesses may be examined to show that such words were improperly struck out; but not to falsify the record by showing that an alteration whereby a record was made correct was improperly made.

Not only is it true that the records of a court cannot be impeached by parol except as before stated, but the same is true of *any* record required by law to be kept in writing, as of a fire district; *Hunneman v. Fire Dist.*, 37 Vt. 40; *Mayhur v. Gay Head*, 13 Allen (Mass.), 129; town; *Wood v. Mansell*, 3 Blackf. (Ind.) 125; *Howlett v. Holland*, 6 Gray (Mass.), 418; *Blaisdell v. Briggs*, 23 Me. 123; the record of a probate court; *Lamothe v. Lippott*, 40 Mo. 142; the records of a justice court; *Smith v. Compton*, 20 Barb. (N. Y.) 262; *Eastman v. Waterman*, 37 Vt. 494; *Gammon v. Chandler*, 30 Me. 152; the records of a corporation; *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338; the record of deeds; *Brittain v. Lawrence*, 1 D. Chip. (Vt.) 103; *Williams v. Ingalls*, 21 Pick. (Mass.) 288; but in reference to all records except those of a court which can be corrected by proper proceedings, parol evidence is admissible to change or vary them when a manifest error exists, or when it is clear that manifest injustice will otherwise result therefrom, or when the record is imbued with fraud, or when there are two records of the same thing which are inconsistent with each other. *Lowry v. McMillan*, 8 Penn. St. 157; *Steel v. Glass*, 1 Ga. 495; *Walter v. Belding*, 24 Vt. 658.

Whenever proof is required to be made of any of the matters contained in a



menta veritatis et vetustatis vestigia,"<sup>1</sup> as also "the treasure of the king."<sup>2</sup> But the judgments of tribunals are not in general receivable in evidence against those who

<sup>1</sup> Co. Litt. 118 a; 293 b. See 2 Rol. 296.

<sup>2</sup> 11 Edw. IV. 1.

record, it must be done by the record itself or a certified copy thereof in all cases where the law so provides, and the record stands as infallible proof of the facts contained in it, except in the cases before enumerated. This results from the very necessity of things, which requires stability and permanence, and some point in certain human affairs, where absolute certainty exists and can be reached. It is held that an officer's return upon a legal process can be explained by parol; *Williams v. Cheeseborough*, 4 Conn. 356; and that it may be contradicted when it is obtained by fraud; *Com. v. Bullard*, 9 Mass. 270; but in the absence of fraud parol evidence is not admissible to alter or vary it; *Wellington v. Gale*, 13 Mass. 483; but when a return is susceptible of an explanation upon the very face of it, it may be varied or contradicted by parol; *Tilden v. Johnson*, 6 Cush. (Mass.) 354; or when an ambiguity exists therein. *Shoemaker v. Ballard*, 15 Penn. St. 92. But when judgment has been entered upon the process, and the return becomes a part of the record, it cannot be attacked in any collateral proceeding.

In reference to record evidence, it should be understood, that the mere fact that an instrument is recorded does not make the record evidence. The real test is, whether the instrument is by law required to be recorded, or can be recorded at the option of the holder; if not, it has no business upon the record, and the record furnishes no evidence to uphold or sustain it. The purpose of public records is two-fold: first, to preserve the evidence of such acts as the law deems it necessary to have preserved; and, second, that all persons may have knowledge of, or easy means of obtaining knowledge of a class of transactions of public concern. Whenever the law requires an instrument to be recorded, the instant that it is recorded the law presumes every person to be aware of its contents, and all persons are bound to take notice of it, and as against the rights of third persons cannot set up want of notice or knowledge. Therefore, no instrument can go upon the public records, except such as the law provides shall be recorded there; and the record of any other instrument is utterly null and void and of no effect whatever upon the rights of any one, nor can the record or a copy thereof be used in evidence, nor does it operate as notice to any person, even though they have seen the record, of the legal existence of the instrument. *Brown v. Hicks*, 1 Ark. 232; *Filter v. Shotwell* 7 W. & S. (Penn.) 14; *Trummell v. Thurmond*, 17 Ark. 230; *Smith v. Lawrence*, 12 Mich. 431; *Jay v. East Livermore*, 56 Me. 107; *Hatchett v. Connor*, 30 Tex. 104; *Monts v. Stephens*, 43 Ala. 217; *N. Y. Dry Docks v. Hicks*, 5 McLean (U. S.), 111; *Berry v. Matthews*, 13 Md. 537; *Thomas v. Grand Gulf Bank*, 17 Miss. 201; *Children v. Cutter*, 16 Mo. 24.

were neither party nor privy to them ; although, in some instances, the law from motives of policy renders them conclusive and binding on all the world, as in the case of

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There are yet another class of records, which, although not required to be kept by any special statute, are yet a species of *quasi* record which gives them character as evidence, when their genuineness is established. The record of the doings of any public officer, whose doings or proceedings are properly and essentially a matter of record by him, are *prima facie* evidence of his official acts. This species of records is not entitled to the weight, or endowed with the character of records proper, but, uncontradicted, they stand as evidence of the official acts of the officer by whom they are kept, or of the particular department over which he presides. But in reference to all matters except such as become matters of record by virtue of the statute, the question as to what is or is not a record is essentially one of fact. Thus, in *Sprague v. Bailey*, 19 Pick. (Mass.) 436, the town clerk had entered in his record that a certain person had been elected to the office of Treasurer. This was an error, and he obtained leave to amend his record, which he did, by inserting in the record that the person "was duly elected tax collector according to my best belief." The court held that this was not a record, and could not be used as evidence of the fact that the person was elected tax collector. A record must necessarily, in order to be entitled to the character of a record, be the official statement of a fact, without qualification, uncertainty or doubt. It must be direct, positive and certain, so as to afford conclusive evidence of all it states.

In *Kybury v. Perkins*, 6 Cal. 674, the court say that "to entitle a book to the character of an official register, it is not necessary that it should be required by an express statute to be kept, nor that the nature of the office should render the book indispensable. It is enough that it is kept by the proper officer. But to entitle such a book to be used as *prima facie* evidence of the facts contained in it, it is necessary that it should be clearly identified as a book kept under the direction of a public officer who had jurisdiction over the matters to which it relates. *Bean v. Smith*, 20 N. H. 461. Such documents cannot be proved by a certificate of an officer who has the legal custody of them, but must be proved and identified like any other document by the best evidence. *Bouchiand v. Dias*, 3 Den. (N. Y.) 237. Of this class of records, or rather documents, are receipts indorsed upon records; *Lathrop v. Blake*, 3 Penn. St. 483; blotters in the land office; *Strimpfer v. Roberts*, 18 Penn. St. 283; a collector's books; *U. S. v. Howland*, 2 Cranch (U. S. C. C.), 508; the books of account kept by a paymaster; *United States v. Kuhn*, 4 Cranch (U. S.), 401; an entry of a mining claim in the recorder's office according to local custom; *Praulus v. Pacific, etc., Co.*, 35 Cal. 30; books kept by the selectmen of a town, containing a statement of moneys of the town expended by them; *Thornton v. Compton*, 18 N. H. 20; any book kept by a county clerk not required by law to be kept by him, but which he kept for convenience, that contains facts relating to business of his

judgments in rem.<sup>1</sup> Among public documents of a judicial nature, but not of record, may be mentioned various forms of inquisitions, depositions, examinations, writs,

<sup>1</sup> *Infra*, bk. 3, pt. 2, ch. 9.

office; *Browning v. Flannigin*, 22 N. J. 567; *Groesbeck v. Seeley*, 13 Mich. 329; school district records; *Sanborn v. School Dist.*, 12 Minn. 17; defective plats of the survey of a grant filed in the recorder's office, or recorded in the surveyor-general's office; *Ott v. Soulard*, 9 Mo. 581; documents relating to public matters that have for many years been deposited in a public office, and which have been regarded as public papers, are admissible in evidence without proof of their genuineness. As the map of the village of St. Louis by Auguste Choteau, one of the reputed founders of said village, in 1864, which was deposited in the office of the United States recorder of land titles in 1825, is admissible to show the plan upon which the village was laid out; *St. Louis v. Erskine*, 31 Mo. 110; *Whiteford v. Bickford*, 29 N. H. 471; official books of county commissioners; *Cuttle v. Brockway*, 24 Penn. St. 145; a map and field-book of the survey of a tract of land, duly certified according to law and filed in a public office; *People v. Dennison*, 17 Wend. (N. Y.) 312; the record of the board of supervisors of a county under the seal of the board; *Blackman v. Dunkirk*, 19 Wis. 183; commissioner's book for subscriptions to the stock of an incorporated company; *Turnpike Co. v. Van Ness*, 2 Cranch (U. S.), 449; the records of the land office; *Galt v. Galloway*, 4 Peters (U. S.), 332; a record of baptism made by the minister of a parish; *Huntley v. Comstock*, 2 Root (Conn.), 99; the plat of a road laid by county commissioners; *Hiner v. People*, 34 Ill. 297; the report of assessors; *Eel. Ass. v. Topp*, 16 Ired. 242; a book kept in town clerk's office relating to births and marriages; *Sumner v. Sebee*, 3 Me. 323; and other books and documents of a similar character and description. These, however, like all other records, except the records of judgments and proceedings of courts of record, and of the legislature and executive departments of the government, may be rebutted and completely overcome by proof of their falsity. *Prima facie* they establish the facts contained in them, but they do not import absolute verity. Thus in New York it is held that the record of a deed or will is only *prima facie* evidence of the authority of the original, and this is necessarily so, else forged instruments by the mere fact of record might be invested with all the force and validity of a genuine instrument, and thus the title to property be left to the mercy of sharpers and criminals. *Morris v. Keyes*, 1 Hill (N. Y.), 540.

When the statute has not made provision for the use of certified copies of records in evidence, either the originals must be produced, or, if lost, their contents proved by the best evidence possible; *Norris v. Russell*, 5 Cal. 249; *Macy v. Goodwin*, 6 id. 579; *Newcomb v. Drummond*, 4 Leigh (Va.), 57; *Hall v. Manchester*, 40 N. H. 410; or if the papers or records are in the custody of an officer not within the jurisdiction of the court, or the production of the originals cannot be

pleadings, &c. : and among those of a public nature not judicial, the journals of the Houses of Parliament, the books of the Bank of England, Registers of births, marriages and deaths, corporation books, books of heralds' visitations, books of deans and chapters, &c.

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enforced, sworn or attested copies of the original may be given in evidence. *Raymond v. Longworth*, 4 McLean (U. S.), 481; *Gray v. Davis*, 27 Conn. 447; *York v. Gregg*, 9 Texas, 85. Even where the statute provides for the use of certified copies the original may be used; *Miller v. Hale*, 26 Penn. St. 432; *Vose v. Manly*, 19 Me. 331; and may even be proved by secondary evidence, if no better evidence can be produced. *United States v. Lamb*, 12 Peters (U. S.), 1.

The mere fact that the statute requires an instrument to be recorded does not necessarily make a copy of the record admissible in evidence, nor even the record itself, unless provision is made therefor by statute. In cases where the statute does not make such provision, neither such record nor copies thereof are admissible without proof of the loss of the original document, nor then, if better evidence exists. *Dick v. Balch*, 8 Peters (U. S.), 30; *Fellows v. Van Hying*, 23 How. Pr. (N. Y.) 230; *Stevens v. Reed*, 37 N. H. 49; *Hale v. Palmer*, 5 Mo. 403.

In all cases where the statute provides for the record of documents, or of certain proceedings, and makes a copy of such record, certified by the officer having the custody thereof, admissible in evidence, such record or a copy thereof *may* be used, and in the absence of the original document *must* be used, unless their destruction is proved, in which case the contents may be proved by secondary evidence and resort must be had to the highest evidence existing. If the original record of a judgment is lost, it may be proved by the docket entries and the original papers in the cause, or by a copy thereof, but before such proof can be made, the destruction or loss of the record and original files must be proved unmistakably. *Donaldson v. Winter*, Miller, 137; *Adams v. Betz*, 1 Watts (Penn.), 425; Buller's N. P. 228; *Jenkins v. Parkell*, 25 Ind. 473.

Thus, where the docket is proved to be lost the entries therein may be proved by parol; *Pruden v. Allen*, 23 Pick. (Mass.) 187; *Tillotson v. Warner*, 3 Gray (Mass.), 574; *Langley v. Vose*, 27 Me. 179; *Jay v. East Livermore*, 56 id. 115; but when no record and no minutes or docket entry have been made, parol evidence cannot be received to supply it; *Sayles v. Briggs*, 4 Metc. (Mass.) 421; but Hubbard, J., in the same case adds: "The cases are abundant to show that a lost record, like a lost deed, may be proved by parol, and that the minutes may be used where the record has not been drawn out *in extenso*, as containing the elements of the record, and in truth, for the time being, the record itself. If this were not the rule, substantial injustice might be done to innocent parties who had no duty to perform in making up the records, and were not charged with the care of their preservation."

*Public writings.*

§ 219. The principle of the admissibility of public writings in general is thus clearly explained in a text work: "Documents of a public nature, and of public

Until the record is made, every thing depends upon the docket entries, hence at any time before the record is completed they may be used in evidence to prove the proceedings in the cause. *Willard v. Harvey*, 24 N. H. 344.

In *Chamberlain v. Sands*, 27 Me. 467, the minutes of a magistrate who was bound to make up a record were held admissible, so in *Langley v. Vose*, 27 id. 179, and also see *Senthers v. Carley*, 49 Me. 337.

Where there is uncertainty as to what persons are intended to be affected by a record, it is competent to identify them by parol, *Dane v. Gilmore*, 49 Me. 179, as where there are several persons by the same name, which one is the one referred to in and affected by it. *Jay v. East Livermore*, 56 Me. 120.

In the case of foreign judgments or judgments of another State, only exemplified copies can be used. Exemplified copies are copies attested by the clerk and a judge of the court in which the judgment is rendered under the seal of the court; *Huff v. Campbell*, 1 Stew. (Ala.) 543; and it must appear from the certificate that the clerk certifying the copy was the clerk of the court at the time when the certificate was made, and that the attestation of the clerk is in due form. *Johnson v. Howe*, 2 Stew. (Ala.) 27; *Trigg v. Conway*, 1 Hemp. (Tenn.) 538. And if there are several distinct papers they must be attached to each other, so that the court can see that the certificate applies to all of them. *Herndon v. Gives*, 16 Ala. 261. And the seal of the court must be impressed upon the certificate or accompany it, or the copies will not be admissible. *Thomason v. Driskell*, 13 Ga. 253; *Hinton v. Brown*, 1 Blackf. (Ind.) 429.

An execution is no proof of a judgment, and, except in the court from which it is issued, the judgment upon which it stands must be proved; *Tindall v. Murray*, 1 Hemp. (Tenn.) 21; *Campbell v. Strong*, id. 265; so neither does the record of a levy of an execution, or a sheriff's deed on the sale of land, prove the existence of a judgment; but the person claiming under either must produce the judgment; *Townsend v. Wesson*, 4 Duer (N. Y.), 342. But, where neither a copy of the judgment nor the record can be found, the courts will presume that a judgment was rendered upon which it issued. *Gooch v. Scheidler*, 20 Tex. 443.

An exemplified copy of a judgment imports absolute verity; therefore, the party proving it need not prove that it has not been reversed. If such is the fact, the other party must establish it by an exemplified copy of the record of the judgment of reversal. *Schoonmaker v. Lloyd*, 9 Rich. (S. C.) 173; *Mandeville v. Stockett*, 28 Miss. 398.

A record of a judgment is not proof of any thing except what was done by

authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and

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the court in the action; it does not establish the truth of the pleadings or facts alleged therein; *Saltmarsh v. Bower*, 34 Ala. 613.

Previous to the making of a record in an action, the proceedings in the cause may be proved by the original files and the docket entries. *Sutcliffe v. State*, 18 Ohio, 469.

The proceedings in a cause need not be proved; the record itself is sufficient, without proof of the proceedings. *Henderson v. Cargill*, 31 Miss. 367; *Smith v. McGehu*, 14 Ala. 404.

A certificate of a judgment record may be made by a deputy clerk, if the presiding judge certifies that it is in due form. *Stedman v. Patchin*, 34 Barb. (N. Y.) 218.

The original records are always competent evidence in the court to which they belong; but in all other courts copies properly authenticated are necessary. *Betts v. New Hartford*, 25 Conn. 180; *Wand v. Saunders*, 6 Ired. (N. C.) 292; *Adams v. State*, 11 Ark. 466.

Justice courts are regarded as within the act of Congress, and their records, properly authenticated, are admissible in evidence in another State; but such judgments are not entitled to the same credit as other judgments, but are placed on the same ground as foreign judgments, and are open to examination on the merits. *Gay v. Lloyd*, 1 Green (Iowa), 78; *Robinson v. Prescott*, 4 N. H. 450; *Trader v. McKee*, 2 Ill. 558; *Brown v. Edson*, 23 Vt. 435; *Bissell v. Edwards*, 5 Day (Conn.), 363.

In order to prove a justice's judgment of another State, the copy of the records should be accompanied by a certificate of the county clerk, that he *was* a justice of the peace at the time that the judgment was rendered, and that he had authority to render the judgment, and the certificate of the presiding judge that the certificate of the justice is in due form. *Remington v. Henry*, 6 Blackf. (Ind.) 64; *Guesdorf v. Gleason*, 10 Iowa, 495. The certificate of the presiding judge should show that the certificate of the clerk is in proper form; *Linch v. McLemore*, 15 Ala. 632; and that the county in which the proceedings were had is in his judicial circuit; *Elliott v. McClelland*, 17 Ala. 206; if there is more than one judge in the circuit, that he is chief justice; *Settle v. Allison*, 8 Ga. 201; and the attestation of the clerk must bear the seal of the court; *Allen v. Thoxter*, 1 Blackf. (Ind.) 399. When a judgment is thus authenticated, it is conclusive evidence of the proceedings therein set forth. *Mitchell v. Osgood*, 4 Me. 124; *Miles v. Collins*, 1 Mete. (Ky.) 308.

The judgment of a foreign country by the common law may be proved in either of three ways: First, by a copy thereof attested under the seal of State; second, by a copy proved to be a true copy by some person who has examined and compared it with the original; and, third, by a certificate of the

\*the power of cross-examining the parties on whose authority the truth of the document [ \* 303 ] depends. The extraordinary degree of confidence thus

officer authorized by law to give a copy. *Steward v. Swanzey*, 23 Miss. 502. Thus it has been held that a copy of a will executed in a foreign country is sufficient if sworn to be correct by one of the witnesses to the original will. *Emdorff v. Carmichael*, 3 Litt. (Ky.) 472.

A copy of a foreign judgment attested under the seal of State of the country in which it is rendered, is admissible in evidence even though it is not certified to be a copy of an original record by an officer of the court. *Mumford v. Bowne*, Anthon's N. P. (N. Y.) 40; *Griswold v. Pitcairn*, 2 Conn. 85. Gould, J., in *Griswold v. Pitcairn*, *ante*, says: "In the proof of foreign judgments there must, from the nature and necessity of the case, be some ultimate limit beyond which no solemnity of authenticity can be required, and the public national seal of a kingdom or State is, by the common consent and usage of civilized communities, the highest evidence, and the most solemn sanction of authenticity, in relation to proceedings, either diplomatic, or judicial, that is known, in the intercourse of nations, and as such, is taken notice of judicially by courts of justice in other States. Anonymous, 9 Mod. 66; *U. S. v. Johns*, 4 Dall. (U. S.) 416; *Peake's Ev.* 73; *Church v. Hubbard*, 2 Cranch (U. S.), 187; while the seals of foreign municipal courts must be proved by extrinsic evidence; *Delafield v. Hand*, 3 Johns. (N. Y.) 310; *Gilb. Ev.* 20; *Henry v. Adey*, 3 East, 221; *Collin v. Lord Matthew*, 5 East, 473. \* \* \*

"It is also objected that there is no certificate that the document is a copy of an original; and that there is no official signature of any clerk or prothonotary. *There can be no need of either.* We surely cannot require that the mere artificial forms of certifying or exemplifying records in foreign courts should correspond precisely with our own. Upon that principle, no foreign record could, perhaps, ever be proved in our courts. But what seems decisive of the question is, that such a certificate and signature, if supplied, would not prove the seal, nor conduce to prove it. 3 East, 221. The seal, it is true, would prove them; but it proves itself, and as well without as with them, all that is substantially necessary, *the genuineness of the record.*

"But there is no evidence, it is said, that the seal was affixed by a proper officer. Assuming the seal to be genuine, that fact must, of course, be presumed, unless the contrary is shown. For any higher evidence of the fact appearing upon the face of the record, than the seal itself imports, is impossible; and to require extrinsic evidence of the fact would subvert the rule itself, that a national seal is the highest proof of authenticity." See, also, *Thompson v. Stewart*, 3 Conn. 171; *United States v. Wiggin*, 14 Pet. (U. S.) 334; *United States v. Rodman*, 15 id. 130.

In *Buttrick v. Allen*, 8 Mass. 273, a copy of a foreign judgment was held admissible which was attested by a reputed clerk of the court in which it was rendered, accompanied with the affidavit of a person who assisted the clerk in

reposed in such documents, is founded principally upon the circumstance, that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into, and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials, are in fact the agents of all the individuals who compose the public; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite that they should be confirmed and sanctioned by the ordinary tests of truth; in addition to this, it would not only be difficult, but often utterly impossible, to prove facts of a public nature by means of actual witnesses examined upon oath.”<sup>1</sup> This must not be understood to mean that the contents of public writings are admissible in evidence for every purpose:—each public document is only receivable in proof of those matters, the remembrance of which it was called

<sup>1</sup> Stark. Evid. 272–3, 4th Ed. See acc. *Merrick v. Wakley*, 8 A. & E. 170; *Doe d. France v. Andrews*, 15 Q. B. 759, per Erle, J.; Heinec. ad Pand. pars 4, §§ 127 & 129; and Devotus, Inst. Canon. lib. 3, tit. 9, § 20.

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comparing the copy with the original record, and in affixing the seal to the copy, and saw the clerk attest it. See, also, *Pickard v. Bailey*, 26 N. H. 152.

In *Owings v. Nicholson*, 4 Harr. & J. (Md.) 74, a copy of a judgment rendered in a French island was held admissible in evidence, when it was proved by one skilled in French law and the proceedings of French tribunals that it was authenticated in the manner used and authorized in the territories and tribunals of France, the signature of the chief judge being proved, and the seal thereto being shown to be similar to that used at the same time as the colonial seal of another French island.



into existence to perpetuate. Some public writings are like records — conclusive on all the world: but this is not their general character; as, most usually, they only hold good until disproved.(a)

*Private writings — Deeds.*

§ 220. Among private writings, the first and most \*important are those which come under the description of “deeds,” *i. e.*, “writings sealed [ \* 304 ] and delivered.”<sup>1</sup> And they differ from inferior written

<sup>1</sup> 2 Blackst. Comm. 295; Co. Litt. 171 b; Finch, L. 108.

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(a) Public documents are admissible in evidence to establish matters of public concern contained in them, but are not generally competent to prove a fact of a private nature; *Hundred v. Del Hogo*, 20 N. J. 328; *Lurton v. Gilliam*, 2 Ill. 577; *Swinnerton v. Columbian Ins. Co.*, 9 Bosw. (N. Y.) 361; and are not conclusive, but only *prima facie* evidence of the facts alleged in them. *Dulaney v. Dunlap*, 3 Cold. (Tenn.) 306. Thus the proclamation of the governor of a State as to who was elected to congress; *Lurton v. Gilliam*, *ante*; or printed reports of any public officer made pursuant to law; *Dulaney v. Dunlop*, *ante*; State papers published by authority. *Dutillett v. Blanchard*, 14 La. Ann. 97; are competent evidence of the facts contained in them, but are not conclusive, and may be rebutted by proof. *Watkins v. Holman*, 16 Peters (U. S.), 25; *Nixon v. Porter*, 34 Miss. 697.

The laws of a State published by authority are admitted to be read in that State as proof, but the statute law of a sister State must be proved by the production of the law itself duly certified, or by the public statutes duly authenticated. But the common law of a State may be proved by parol; *Robinson v. Clifford*, 2 Wash. (U. S.) 1; *Craig v. Brown*, Pet. (U. S. C. C.) 352; *Hite v. Lenhart*, 7 Mo. 22; *Bailey v. McDowell*, 2 Harr. (Del.) 34; *Stanford v. Pruest*, 27 Ga. 243; but in Alabama, Arkansas, Indiana, Kentucky, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, Pennsylvania, South Carolina, Texas and Vermont it is held that statutes of another State purporting to be printed by authority are *prima facie* evidence as to all public or private acts contained therein. In all other States duly authenticated copies are required to be produced.

The laws of foreign countries must be proved like any other facts; *Bryant v. Kelton*, 1 Tex. 434; and may be proved by parol, unless they are shown to be in writing; *Livingston v. Ins. Co.*, 6 Cranch (U. S.), 674; but if shown to be in writing, so far as statutes and edicts are concerned, they must be produced; *United States v. Ortega*, 4 Wash. (U. S.) 531; and the certificate of a consul under his official seal is no evidence of such laws. *Stein v. Bowman*, 13 Pet. (U. S.) 209.

instruments in this important particular, viz., that they are presumed to have been made on good consideration; and this presumption cannot be rebutted,<sup>1</sup>(a) unless the instrument is impeached for fraud;<sup>2</sup>(b) whereas, in con-

<sup>1</sup> Plowd. 309; 3 Stark. Ev. 930, 3rd. Ed.; Id. 747, 4th Ed.

<sup>2</sup> Id.

(a) It is competent to show that there was no consideration for a deed; *Estabrook v. Smith*, 6 Gray (Mass.), 572; *Andrews v. Andrews*, 12 Ind. 348; *Groesbeck v. Seeley*, 13 Mich. 329; *Myers v. Peck*, 2 Ala. 648; *Johnson v. Taylor*, 4 Dev. (N. C.) 355; *Peck v. Vandenberg*, 30 Cal. 11; *Gelpcke v. Blake*, 19 Iowa, 263; *Gordon v. Gordon*, 1 Metc. (Ky.) 285; *Gibson v. Seymour*, 3 Vt. 565; or to show that the consideration named in the deed is not the real consideration for which it was given; *State v. Worthington*, 2 Ohio, 182; *Corneal v. May*, 2 A. K. Marsh. (Ky.) 587; *Hayden v. Mentzer*, 10 S. & R. (Penn.) 329; *Miller v. Goodwin*, 8 Gray (Mass.), 542; *Bank v. Brown*, Riley (S. C.), 131; *Perry v. Railroad Co.*, 5 Cold. (Tenn.) 138; *Dayton v. Warren*, 10 Minn. 233; *Harwood v. Harwood*, 22 Vt. 507; *Headley v. Briggs*, 2 R. I. 489; *Ibrey v. Vanderhoof*, 15 Wis. 297; but in a trial at law the grantor or his heirs or legal representatives are estopped from setting up want of consideration, or a consideration inconsistent with that named in the deed, but this estoppel does not extend to third persons; *Holbrook v. Holbrook*, 30 Vt. 432; *Stackpole v. Robinson*, 47 Barb. (N. Y.) 212; *Ely v. Olcott*, 4 Allen (Mass.), 406; *Johnson v. Boyles*, 26 Ala. 576; *Wooden v. Shotwell*, 23 N. J. 465; *Jones v. Jones*, 12 Ind. 389; *Lawton v. Buckingham*, 15 Iowa, 22; *Knowles v. Ferguson*, 7 Minn. 442; *Emery v. Chase*, 5 Me. 232; *Griswold v. Messenger*, 6 Pick. (Mass.) 517; but parol evidence in a trial at law may be received to show a consideration in addition to that named in the deed; *Ibrey v. Vanderhoof*, 15 Wis. 397; *Hayden v. Mentzer*, 10 S. & R. (Penn.) 329; *Miller v. Goodwin*, 8 Gray (Mass.), 542; *Perry v. Railroad Co.*, 5 Cold. (Tenn.) 138; or that it was for property instead of money; *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555; *Steele v. Worthington*, 2 Ohio, 182; *Guinotte v. Choctau*, 34 Mo. 154; and where no consideration is named, the true consideration may be proved. *Wood v. Beach*, 7 Vt. 522; *Merle v. Matthews*, 26 Cal. 455; *Frink v. Green*, 5 Barb. (N. Y.) 455; *White v. Weeks*, 1 Penn. St. 486.

So it is competent to show that the consideration has not been paid, the acknowledgment of payment being treated merely as a receipt for money and affording only *prima facie* evidence of payment. *White v. Miller*, 22 Vt. 380; *Speer v. Speer*, 14 N. J. 240; *Elder v. Hood*, 38 Ill. 533; *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266; *Bassett v. Bassett*, 55 Me. 127; *Millard v. Hathaway*, 27 Cal. 119; *DeLoach v. Turner*, 6 Rich. (S. C.) 117; *Clapp v. Linell*, 20 Pick. (Mass.) 237; *Gibson v. Fifer*, 21 Lex. 260.

(b) The rule is, in reference to deeds and all other sealed instruments, that parol evidence is never admissible at law to alter or vary their terms, except when they are attacked for fraud, or when there is a mistake in the instrument

tracts not under seal a consideration must be alleged and proved.<sup>1</sup> In former ages deeds were rarely signed, and the essence of that kind of instrument consisted, and indeed consists still, in the sealing and delivery.

“Re, ~~verbis~~, scripto, consensu, traditione,  
Junctura, vestes sumere pacta solent”

<sup>1</sup> *Rann v. Hughes*, 7 T. R. 350 (n.)

which a court of law, by virtue of the Equity powers conferred upon it, can reform or correct on the trial. But this rule is applicable entirely to the actual covenants between the parties, and has no applicability to those incidental matters that form no part of the granting or covenanting part of the deed, and a change in which would not affect or vary the actual contract between the parties. Formerly a sealed instrument was endowed with extraordinary qualities, and was regarded as an instrument of such solemnity, and of such a high character, that even as to incidental matters, parol evidence was excluded. But latterly the strictness of this rule was found to operate so harshly, so disastrously even, that courts of law have found it necessary to relax the strictness of the rule and allow parol evidence to be given in reference to collateral or incidental matters, that have no bearing upon the actual terms of the instrument. The practice has become so common of putting fictitious sums into a deed as the consideration thereof, sometimes much less, and sometimes much *more* than the actual price, that a healthful administration of legal justice has compelled courts to hold that, in all instances where in actions between the parties to a deed the *real* consideration of a deed becomes material, it may be shown by parol. *Rhine v. Eilen*, 36 Cal. 362; *Stackpole v. Robinson*, 47 Barb. (N. Y.) 212; *Spiers v. Clay*, 4 Hawks (N. C.), 402; *Drury v. Tremont Ins. Co.*, 13 Allen (Mass.), 168; *Lamb v. Donovan*, 19 Ind. 40; *Rabushi v. Lack*, 35 Mo. 316; *Booth v. Hynes*, 54 Ill. 363; *McKinstler v. Babcock*, 26 N. Y. 378; *Guinotte v. Choteau*, 34 Mo. 154; *Ibrey v. Vanderhoff*, 15 Wis. 397; *Miller v. Goodwin*, 8 Gray (Mass.), 542; *Hedley v. Briggs*, 2 R. I. 489; *Gibson v. Seymour*, 3 Vt. 565; *Harwood v. Harwood*, 22 Vt. 507; *Gelpcke v. Blake*, 19 Iowa, 263; *Scott v. Watts*, 2 J. J. Marsh. (Ky.) 110. The grantor cannot show that the consideration was less than that named in the deed except where fraud is alleged. *Greenwault v. Davis*, 4 Hill (N. Y.), 643. In *Lawton v. Buckingham*, 15 Iowa, 22, the court say “the consideration named in a deed is only *prima facie* evidence of the amount actually paid, and in an action for breach of covenants an averment that the consideration was greater than that shown in the deed, is sufficient to render evidence admissible to show a mistake in the statement of the consideration, and to show what the real consideration was.” Thus, where a deed is given, ostensibly for a valuable money consideration, it may be shown to be in fact a gift for a good consideration, and if it appears to be a voluntary conveyance, it may be shown to be for a valuable consideration in money.

has been the rule from the earliest times.<sup>1</sup> "No deed, charter, or writing, can have the force of a deed without a seal,"<sup>2</sup> and "*traditio loqui facit chartam.*"<sup>3</sup> Deeds are

<sup>1</sup> Bracton, lib. 2, c. 5, fol. 16 b; Plowd. 161 b; Co. Litt. 36 a.

<sup>2</sup> 3 Inst. 169.

<sup>3</sup> 5 Co. 1 a; Lofft, Max. 159, 188.

Lewis v. Brewster, 57 Penn. St. 410; Corneal v. May, 2 A. K. Marsh. (Ky.) 587; Steele v. Worthington, 2 Ohio, 182; Miller v. McCoy, 50 Mo. 214; Pierce v. Breer, 43 Vt. 292. The rule is, that any thing may be shown that is not inconsistent or incompatible with that which is expressed in the deed. Wait v. Wait, 28 Vt. 350; as that a consideration purporting to be for money, was in fact for property. Hickman v. McCurdy, 7 J. J. Marsh. (Ky.) 555; or where the consideration is expressed to be for a certain sum, it may be shown that there was an *additional* consideration. Bank of U. S. v. Brown, Riley (S. C.), 131; Hayden v. Mentzer, 10 S. & R. (Penn.) 329; Miller v. Goodwin, 8 Mass. 542; Vail v. McMillan, 17 Ohio St. 617; or where a merely nominal, or in fact no consideration is set up in a deed, the true consideration may be shown. Frink v. Green, 5 Barb. (N. Y.) 455; Wood v. Beach, 7 Vt. 522; Merle v. Matthews, 26 Cal. 455. Where the money consideration in a deed is expressed to be for one dollar, for property worth ten thousand times that sum, neither party is estopped from showing what the real consideration was, but the consideration cannot be impeached by the parties, and the grantor cannot deny that it was a valuable consideration, but the real and true consideration may be shown. Booth v. Hynes, 54 Ill. 363.

So, although the grantor cannot set up want of consideration in a deed, yet a creditor of the grantor, or a subsequent purchaser of the premises from him, may show by parol or otherwise that there was no valuable consideration. Groesbeck v. Seeley, 13 Mich. 329; Estabrook v. Smith, 6 Gray (Mass.), 572; Johnson v. Taylor, 4 Dev. (N. C.) 355; Myers v. Peeks, 2 Ala. 648; Gordon v. Gordon, 1 Metc. (Ky.) 285; Peck v. Vandenberg, 30 Cal. 11; Andrews v. Andrews, 12 Ind. 348.

A mistake in a deed cannot be shown by parol in a court of law, unless the court is endowed with equity powers, and can reform the instrument to make it conform to the real contract or understanding between the parties. But a court of equity will receive parol evidence to show a mistake, in any part of the deed, on a bill brought to reform it; McKilway v. Armour, 10 N. J. 115; Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585; Chew v. Gillespie, 56 Penn. St. 308; so where a deed is claimed to have been obtained by fraud or misrepresentation, parol evidence, varying its terms, will be received, to ascertain wherein the fraud consists, but not otherwise. Hillman v. Wright, 9 Ind. 126.

But where a mistake in the granting or covenanting clause of a deed is claimed to exist, it cannot be proved by parol in a court of law. If an actual mistake exists, the party setting it up should resort to a court of equity for a

usually attested by witnesses, who subscribe their names to signify that the deed has been executed in their presence.<sup>1</sup> Anciently the number of witnesses was greater

<sup>1</sup> 2 Blackst. Comm. 307.

reformation of the contract. Thus, in *Child v. Wells*, 13 Pick. (Mass.) 215, the grantor conveyed to his grantee "one-half of an undivided tract of land," and in the same deed "also a tract of land," describing it. It was claimed by the grantor that it was only intended by him to convey, by the words used in the deed, a moiety of both tracts; but the court held that the language of the deed conveyed the *whole* of the last-described lot, and that parol evidence was not admissible to show the real intention of the parties. This was an offer to vary a substantial part of the contract by parol, which is never admissible in a court of law.

Parol evidence is always admissible to arrive at the intention of the parties to a deed, where there is any latent ambiguity, as that a deed purporting to be absolute on its face, was really given in trust or as security for a debt, and intended as a mortgage; *Walcott v. Ronalds*, 2 Rob. (N. Y.) 617; *Purcell v. Burns*, 39 Conn. 429; *Kimball v. Myers*, 21 Mich. 276; *Morrall v. Waterson*, 7 Kan. 199; *Anding v. Davis*, 38 Miss. 574; *Cunningham v. Hawkins*, 27 Cal. 603; *Zimmerman v. Marchland*, 23 Ind. 474; *Preshbacker v. Feaman*, 32 Ill. 475; *Condit v. Tichenor*, 4 Green (N. J.), 43; *Key v. McClearey*, 25 Iowa, 191; *Bingham v. Thompson*, 4 Nev. 224; *Phenix v. Gardner*, 13 Minn. 430; *Grave v. Reutch*, 26 Md. 367; *Green v. Ball*, 4 Bush (Ky.), 586; *Mann's Executors v. Faicon*, 25 Tex. 271; *Sweet v. Mitchell*, 15 Wis. 641; but the proof must be more than preponderating, it must be satisfactory and convincing; *Bingham v. Thompson*, 4 Nev. 224; or to apply its descriptive part to the natural objects called for, to embrace the land intended to be conveyed, but which by errors in the courses or distances is not covered by the deed; *Attshall v. San Francisco, etc., Association*, 43 Cal. 171; but where no natural objects are given, such evidence is not admissible to explain an ambiguity patent upon the face of the deed. *Horner v. Stilwell*, 35 N. J. 307; *Peacher v. Strauss*, 47 Miss. 358; *Clarke v. Lancaster*, 36 Md. 196; *Myme v. Alexander*, 7 Ired. (N. C.) 237.

The rule is, that if the starting point designated in the deed can be found, and the courses and distances are accurately given, the boundaries must be settled by them, and parol evidence is not admissible to alter or affect them; *Waugh v. Waugh*, 28 N. Y. 94; *Liverpool Wharf v. Prescott*, 4 Allen (Mass.), 22; but where a navigable boundary is referred to, or the boundaries since have not acquired a fixed legal construction, parol evidence is admissible to determine the meaning of the deed; *Waterman v. Johnson*, 13 Pick. (Mass.) 261; but where there is a latent ambiguity, as where a conveyance was made of a lot by number, according to the plat of the town on file in the office of the register of deeds, and it turns out that there are two plats on file in the office essentially different, parol evidence is admissible to show which plat was in-

than at the present day; and when the execution of a deed was put in issue, process was issued against the witnesses whose names appeared on the instrument, who, on

tended to be referred to; *Schreiber v. Orton*, 50 Mo. 513; *Slosson v. Hall*, 17 Minn. 95; and, generally, where there is any doubt about the property covered by the deed, parol evidence may be given to identify it, not inconsistent with the deed; *Means v. De La Vergne*, 50 Mo. 343; *Hutton v. Arnett*, 51 Ill. 198, *Bell v. Woodard*, 46 N. H. 315; *Hughes v. Sandal*, 25 Texas, 162; *Hoody v. Matthews*, 38 Md. 121; *Webster v. Blount*, 39 Mo. 500; *Ives v. Kimball*, 1 Mich. 308; but not to incorporate new words into a deed, as where in a deed the word *degrees* is used in the place of *perches*, so that the deed reads, "North, thirty-eight *degrees*, instead of North, thirty-eight *perches*," it was held that parol evidence was not admissible to explain it. *Clark v. Lancaster*, 36 Md. 196; *King v. Fink*, 51 Mo. 209.

It is held that, when a deed refers to a certain plat for one of the lines of the boundary, in the absence of the plat, written or parol proof, or both, may be resorted to to show the existence and location of the line; *Deery v. Cray*, 10 Wall. (U. S.) 263; and, generally, to identify the land conveyed when the description is vague and uncertain, the real boundaries may be shown by parol. *Petit v. Shepard*, 32 N. Y. 97; *Brinkerhoff v. Olp*, 3 Barb. (N. Y.) 27; *Hancock v. Watson*, 18 Call. 127; *Ives v. Kimball*, 1 Mich. 308.

Courses and distances must always yield to natural or artificial monuments, and courses must be varied and distances lengthened or shortened so as to conform to the natural or ascertained boundaries named in a deed. But, where there are no monuments, natural or artificial, named in the deed, the courses and distances are decisive. *Bruckner's Lessee v. Lawrence*, 1 Doug. (Mich.) 19; *Britton v. Ferry*, 14 Mich. 184.

A deed, in the absence of fraud or a latent ambiguity, can never be explained by the declaration of the grantor at the time of the sale or conveyance. *Caldwell v. Layton*, 44 Mo. 220.

Thus, where a deed on the face of it, and in terms conveyed an undivided interest in land, it cannot be shown that the grantor, who was, at the time he made the conveyance, the owner of the whole lot, intended to convey a particular interest which he had acquired from the former owner of an undivided portion of the lot; *Phillips v. Castley*, 40 Ala. 486; or to show that the signature of a party to a deed was obtained by fraud; *Westbrook v. Jeffers*, 33 Tex. 86; *Beers v. Beers*, 22 Mich. 42; but where fraud is shown, parol evidence may be given, the effect of which is to attach to the deed a condition repugnant to the provisions of the deed; *Beers v. Beers, ante*; *Willis v. Kern*, 21 La. Ann. 749; but parol evidence is never admissible to add to or contradict the covenants of a deed, or to add a new covenant thereto; *Sawyer v. Voorhies*, 44 Ga. 662; *Warren v. Creer*, 22 Iowa, 315; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; but, where the covenant is not denied, parol evidence is held admissible

their appearance in court, seem to have discharged in some respects the functions of a jury; ' if they were all dead it was tried by a jury — "*Super fidem chartarum mortuis*

<sup>1</sup> 2 Blackst. Comm. 307, 308; Co. Litt. 6. b.

to aid and fortify the construction of the covenant. *Patteson v. Garrett*, 7 J. Marsh. (Ky.) 142.

It is not competent to prove by parol that other property than that named in the deeds should be passed by it, as wood cut and piled upon the land, or manure then upon the premises; *Proctor v. Gilson*, 4 N. H. 62; nor that the grantor reserved plants growing on the land; *Wintermute v. Light*, 46 Barb. (N. Y.) 278; but a parol agreement, made collaterally with a deed, and relating to the property conveyed, but entirely independent of the instrument, may be given; *Buzzell v. Willard*, 44 Vt. 44; or to contradict collateral facts recited in a deed which are not essential to the validity of the conveyance of the estate. *Ingersoll v. Truebody*, 40 Cal. 603.

Parol evidence may be given in an action for deceit in the sale of land, as to representations made by the grantor either as to the quantity, quality, condition or value of the land, such evidence operating in no sense to impeach the deed, but goes to show the inducements to its purchase. *Coon v. Atwell*, 46 N. H. 510. Similar in principle; *Plant v. Candit*, 22 Ark. 454. So where a deed is made to a person omitting the initial letter of his middle name, and there are two persons by the name in which the deed is given, parol evidence may be given to show to which person the conveyance was in fact made. *Peabody v. Brown*, 10 Gray (Mass.), 45. So the origin of the title to land, and the relationship of the vendor and vendee are matters of genealogy which may always be shown by parol. *Smith v. Porter*, 16 La. Ann. 370.

The acknowledgment of the payment of the purchase-money named in a deed is not conclusive upon the parties thereto. It is in the nature of a receipt merely, and it may always be shown by parol that the purchase-money has not in fact been paid. The only effect of the consideration clause is to estop the grantor from setting up want of consideration. For every other purpose it is open to explanation by proof of the real facts of the transaction. *Stackpole v. Robinson*, 47 Barb. (N. Y.) 212; *White v. Miller*, 22 Vt. 380; *Davenport v. Mason*, 15 Mass. 85; *Elder v. Hood*, 38 Ill. 533; *Cales v. Salesby*, 21 Cal. 47; *Speer v. Speer*, 14 N. J. 240; *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266; *Burbank v. Gould*, 15 Me. 118; *Sirgun v. Henderson*, 1 Bland. (Md.) 236; *Bassett v. Bassett*, 55 Me. 127; *Wesson v. Stevens*, 2 Ired. (N. C.) 557; *Halt v. Perry*, 3 Iowa, 579; *Vaugine v. Taylor*, 18 Ark. 65; *Harris v. Harris*, 2 Harr. (Del.) 354; *Shepard v. Little*, 14 Johns. (N. Y.) 210; *Drury v. Improvement Co.*, 13 Allen (Mass.), 168; *Lamb v. Donovan*, 19 Ind. 40.

Where there is uncertainty in the description of the lands conveyed, the declarations and acts of the parties tending to show what their real intention and understanding was, has been held admissible in aid of, where it did not

testibus erit ad patriam de necessitate recurrendum.”<sup>1</sup> In modern practice the rule was, that the execution of a deed must be proved by the testimony of at least one of the [ \* 305 ] \*attesting witnesses.<sup>2</sup> If they were all dead, or insane, or out of the jurisdiction of the court, or could not be found on diligent inquiry, proof might be given of their handwriting;<sup>3</sup> but the testimony of third parties, even though they might have been present at the execution of the instrument, was not receivable to *prove* it. They might, however, be received to contradict the testimony of the subscribing witnesses,<sup>4</sup> although formerly this was doubted.<sup>5</sup> And so far was this principle carried, that even proof of an admission by a party of the execution of a deed, would not in general dispense with proof by the attesting witness.<sup>6</sup> But it was not necessary to call the attesting witness, or indeed to give any other proof of a deed thirty years old or upward, and coming from an unsuspected repository;<sup>7</sup> unless perhaps when there was an erasure or other blemish in some material part of it.<sup>8</sup>

<sup>1</sup> Co. Litt. 6. b.

<sup>2</sup> *Infra*, bk. 3, pt. 2, ch. 7.

<sup>3</sup> See the cases collected, Stark. Ev. 512-521, 4th Ed. and 2 Phill. Ev. 254 *et seq.*, 10th Ed.

<sup>4</sup> *Blurton v. Toon*, Holt, 290; *Hudson's case*, Skin. 79; *Lowe v. Jolliffe*, 1 W. Bl. 365; *Pike v. Badmering*, cited 2 Str. 1096; *Jackson v. Thomason*, 1 B. & S. 745.

<sup>5</sup> Per Alderson, B., in *Whyman v. Garth*, 8 Exch. 803.

<sup>6</sup> *Infra*, bk. 3, pt. 2, ch. 7.

<sup>7</sup> 2 Phill. Ev. 245-6, 10th Ed.

<sup>8</sup> *Id.* 247.

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contradict or vary the deeds; *Waterman v. Johnson*, 13 Pick. (Mass.) 261; *Fletcher v. Phelps*, 28 Vt. 258; *Patch v. Keeler*, *id.* 332; *Clark v. Withey*, 19 Wend. (N. Y.) 320; *Spears v. Burton*, 38 Miss. 547; but where there is no uncertainty, such evidence is not admissible, and the description given in the deed must control. *Emerick v. Kahler*, 29 Barb. (N. Y.) 165; *Bratton v. Clawson*, 3 Strobh. (S. C.) 127; *Pride v. Lunt*, 19 Me. 115.



*Instruments not under seal.*

§ 221. Instruments *not under seal* are sometimes attested by witnesses; and in such cases it was held that the attesting witness must be called, or his handwriting proved, as in the case of a deed.<sup>1</sup> But by the Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 26, which, by sect. 103, applies only to civil proceedings, "It shall not be necessary to prove, by the attesting witness, any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto;" and this is extended to \*criminal [ \* 306 ] proceedings by 28 Vict. c. 18, ss. 1, 7. And by the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 526, "Any document required by this act to be executed in the presence of, or to be attested by, any witness or witnesses, may be proved by the evidence of any person who is able to bear witness to the requisite facts, without calling the attesting witness or witnesses, or any of them." Where there is no attesting witness the usual proof is by the handwriting of the party. The proof of handwriting is so important and peculiar that it will be considered separately.<sup>2</sup>

*Wills.*

§ 222. Next as to wills. By the Statute of Frauds, 29 Car. 2, c. 3, s. 5, it was enacted, that all devises and bequests of lands or tenements to be valid, should be in writing and signed by the party, or by some other

<sup>1</sup> *Earl of Falmouth v. Roberts*, 9 M. & W. 469; *Streeter v. Bartlett*, 5 C. B. 562; *Doe d. Sykes v. Durnford*, 2 M. & Sel. 62; *Higgs v. Dixon*, 2 Stark. 180.

<sup>2</sup> See *infra*, ch. 2.

person in his presence and by his express directions, and attested and subscribed in his presence by at least three credible witnesses. Wills of personalty remained as at the common law and did not require any witness. But by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, this part of the Statute of Frauds is repealed; and it is enacted by sect. 9, that "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." In carrying out the provisions of this enactment, many wills, just and regular in all other respects, were rendered inoperative for inadvertent non-compliance with the forms which it prescribes. [ \* 307 ] \*To remedy this was passed the 15 & 16 Vict. c. 24, s. 1, which, after reciting sect. 9 of the previous act, enacts, that "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance

that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act, shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made." (a)

*Meaning of the rules "Parol evidence is inferior to written," &c.*

\* § 223. Although documents are necessarily brought before the tribunal by means of verbal [ \* 308 ] or parol evidence, that evidence must be limited to giving such a general description of the document as shall be

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(a) In *Adams v. Field*, 21 Vt. 256, it was held that where the party himself wrote his will and commenced it "I, Samuel Adams," that this was a subscribing of the will within the provisions of a statute requiring it to be subscribed in the presence of three witnesses, etc.

sufficient to identify it, and deposing to the real evidence afforded by its visible state. Thus a keeper of records may speak as to the *condition* in which they are, but not as to their *contents*.<sup>1</sup> It is commonly said that "Parol evidence is inferior (or secondary) to written;" that "Written evidence is superior to verbal," &c.;<sup>2</sup> but these axioms must be understood with much allowance and qualification. ( That evidence *in writing*, using the phrase *latori sensu*, is superior to or even more satisfactory than *verbal* evidence cannot, as a general proposition, be supported.) Suppose a man witnesses a transaction, and after he goes home commits a narrative of it to paper, or even puts his seal to the paper, and fifty men attest it as witnesses; whether his memory or that paper would be the best and more trustworthy proof of what took place depends very much on circumstances; such as the natural strength of his memory, whether the transaction were of a nature likely to make an impression on his mind, the time that has elapsed, &c. It is true that the writing has the advantage of *permanence*; it will not decay so soon as the memory of the witness—"Vox audita perit; litera scripta manet;"—but on the other hand the witness may be *cross-examined*, and compelled to give a circumstantial account of all he saw and heard, while the writing only preserves what was committed to it in the first instance, without power of addition or explanation—"Minus obstitisse videtur pudor inter paucos signatores;"<sup>3</sup> "Testibus, non testimoniis, credendum;"<sup>4</sup>—

<sup>1</sup> *Leighton v. Leighton*, 1 Str. 210.

<sup>2</sup> *Contra scriptum testimonium, non scriptum testimonium non fertur.* Cod. lib. 4, tit. 20, l. 1.

<sup>3</sup> Quint. Inst. Orat. lib. 5, c. 7.

<sup>4</sup> Burnett's Crim. Law of Scotland, 495.

\*added to which, the evidence of the witness [ \* 309 ] would be given under the sanction of an oath. So considered merely with reference to probative force, the notes of the judge at a trial would probably be deemed very satisfactory evidence of what there took place. They are not however even receivable as evidence of it. A judge only takes notes for his own private convenience; there is no law requiring him to do so:<sup>1</sup> indeed, in former times, the judges either made no notes, or notes much more scanty than at present; and of Pratt, C. J., in particular, it is said that he never made any.<sup>2</sup> The truth is, that the maxims in question have three applications. 1. In the case of records and other instruments, which the policy of the law requires to be in writing and executed with prescribed formalities, no derivative, and consequently no verbal or other parol,<sup>3</sup> evidence of their contents is receivable, until the absence of the original writing is accounted for; neither is parol or other extrinsic evidence receivable, at least in general, to contradict, vary, or explain them. 2. A like rule holds where writing or formalities are not required by law, but the parties have had recourse to them for the sake of greater solemnity and security; as where a man executes a bond to secure the payment of money, when an unattested writing would have been sufficient; or where a contract for the sale of goods under 10*l*. (and consequently not within the Statute of Frauds) is reduced to writing, &c.\*

<sup>1</sup> Per Lord Abinger, C. B., in *Leach v. Simpson*, 5 M. & W. 309, 311.

<sup>2</sup> See the note to 17 Ho. St. Tr. 1420.

<sup>3</sup> This is not the only instance in our law where the word "parol" is used in a different sense from "verbal" or "oral." Thus, written contracts not under seal are said to be parol "contracts," &c. *Rann v. Hughes*, 7 T. R. 350-1, note.

<sup>4</sup> See the distinction taken in *Bellamy's case*, 6 Co. 38, between deeds "ex institutione legis" and "ex provisione hominis." See, also, per Cutler, 21 H. VII.

[ \* 310 ] 3. Where the contents of *any* \*document are in question, either as a fact directly in issue or a subalternate principal fact, the document is the proper evidence of its *own contents*.<sup>1</sup> But where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some *act*, independent proof aliundè is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it.<sup>2</sup> Or, suppose a man had declared by deed, or even put on record — if such a thing can be supposed — his intention to rob or murder another, this would not exclude verbal or other evidence that he had made similar declarations of intention by word of mouth. So, although where the *contents* of a marriage register are in issue, verbal or other evidence of those contents is not receivable, the *fact* of the marriage may be proved by the independent evidence of a person who was present at it. This distinction is well illustrated by the case of *Horn v. Noel*,<sup>3</sup> in which it was proposed to support the defense of coverture of the defendant by two witnesses, who deposed that they were present in a Jewish synagogue when the defendant was married to H. N. The plaintiff's counsel contended that this evidence was insufficient; that it was necessary for the defendant to show that a marriage had been celebrated according to the rites of the Jews; that with them, what took place in the synagogue was merely a ratification of a previously written contract; and as that contract was essential to the validity of the

5 B. pl. 2; *Buxton v. Cornish*, 12 M. & W. 436; *Knight v. Barber*, 16 Id. 66; and Dig. lib. 22, tit. 4, ll. 4 and 5.

<sup>1</sup> *Infra*, bk. 3, pt. 2, ch. 3.

<sup>2</sup> *Rambert v. Cohen*, 4 Esp. 213.

<sup>3</sup> 1 Camp. 61.

marriage, it ought to be produced and proved.<sup>1</sup> The contract, in the Hebrew tongue, was accordingly put in, and translated by means of an interpreter, and the plaintiff was nonsuited. It must also be added that the rule excluding parol evidence as inferior to written does \*not exclude *circumstantial*,<sup>2</sup> nor, according to the better opinion, *self-deserving* evidence.<sup>3</sup> [ \* 311 ]

*Written narratives or memoranda to refresh the memories of witnesses.*

§ 224. But although documentary evidence may not be receivable, for want of being verified on oath or its equivalent, or traceable to the party against whom it is offered, the benefit of its *permanence* is not always lost to justice. Thus a witness who has drawn up a written narrative, or made a written memorandum of a matter or transaction, may in many cases use it while under examination as a script to refresh his memory.<sup>4</sup>

*Principle "Quomodo quid constituitur eodem modo dissolvitur."*

§ 225. As connected with this subject may be noticed the maxim of law, "Nihil tam conveniens est naturali æquitati unumquodque dissolvi eo ligamine quo ligatum est."<sup>5</sup> "Quomodo quid constituitur," says one of our old books, "eodem modo dissolvitur; record per record

<sup>1</sup> See on this subject Rogers's Eccl. Law, 659, 2nd Ed.

<sup>2</sup> Bk. 3, pt. 2, ch. 1.

<sup>3</sup> Bk. 3, pt. 2, ch. 7.

<sup>4</sup> *Sandwell v. Sandwell*, Comb. 445, Holt, 295; *Doe d. Church v. Perkins*, 3 T. R. 749; *Burton v. Plummer*, 2 A. & E. 341; *Beech v. Jones*, 5 C. B. 696; *Smith v. Morgan*, 2 Moo. & R. 257; 2 Phill. Ev. 480 *et seq.*, 10th Ed.; *Dyer v. Best*, 4 H. & C. 189.

<sup>5</sup> 2 Inst. 360, 573; 4 Inst. 28; 2 Co. 53 a; 4 Id. 57 b; 5 Id. 26 a; 6 Id. 43 b; Jenk. Cent. 2, Cas. 25; 3 Scott, N. R. 215; 17 Q. B. 146.

escript per escript,<sup>1</sup> parliament per parliament, parol per parol.”<sup>2</sup> For instance, things that lie in grant, as they must be created by deed, cannot be surrendered without deed.<sup>3</sup> This principle was also recognized by the Roman law — “Nihil tam naturale est, quam eo genere quicquid dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu dissolvitur.”<sup>4</sup> [ \* 312 ] \*But the performance of a condition in an instrument under seal may be proved by inferior evidence,<sup>5</sup> for this does not invalidate the instrument, but sets it up. Thus, payment of a bond may be proved by parol,<sup>6</sup> &c. (a)

<sup>1</sup> By *escript* here must be understood a writing under seal. The word is often used in our old books in this sense. See *suprà*, § 217, p. 386, note 2.

<sup>2</sup> Jenk. Cent. 2, Cas. 40. See *Wood v. Leadbitter*, 13 M. & W. 838.

<sup>3</sup> Wing. Max. 69; Co. Litt. 338 a.

<sup>4</sup> Dig. lib. 50, tit. 17, l. 35.

<sup>5</sup> See the authorities cited in *West v. Blakeway*, 3 Scott, N. R. 199.

<sup>6</sup> Doct. & Stud. Dial. 1, ch. 12.

(a) It is generally more difficult to determine when the declarations of the parties to a written instrument at the time of the making and delivery thereof are admissible, than in reference to transactions that rest in parol. But it must be borne in mind that while it is true that parol evidence is never admissible to alter or vary the terms of a written instrument, yet there are many purposes for which such evidence is admissible when the contract of the parties is in writing. Not for the purpose of altering or varying the contract itself, but to get at the real *status* of the parties thereto, the inducements that led to the contract, etc., etc. *Lathrop v. Foster*, 51 Me. 367; *Smith v. Higbee*, 12 Vt. 113; *Beckley v. Munson*, 22 Conn. 299; *Beard v. White*, 1 Ala. 436.

Thus, parol proof is not admissible to explain a written contract; *Kimball v. Lull*, 3 McLean (U. S.), 272; *Speer v. Whitfield*, 10 N. J. 107; *Troy Iron and Nail Factory v. Corning*, 40 N. Y. 461; *Norton v. Woodruff*, 2 id. 153; nor to prove a subsequent contract in lieu of the written one where there is no consideration therefor; *Randolph v. Perry*, 2 Post (Ala.), 376; nor when the statute of frauds requires such contract to be in writing; *Northrup v. Jackson*, 13 Wend. (N. Y.) 85; *Martin v. Duffey*, 4 Phil. (Penn.) 75; nor to establish terms or conditions in reference to which the written contract is silent; *Beard v. White*, 1 Ala. 436; nor to show that a different agreement was entered into before or at the time of making the written contract; *Stevens v. Cooper*, 1 Johns. (N. Y.) 425; *Railroad Co. v. Pierce*, 28 Ind. 502; *Gelpcke v. Blake*, 15



*Extrinsic evidence—Not in general receivable to contradict, vary, or explain written instruments—Exceptions—Difference between latent and patent ambiguities—Difference between ambiguity and unintelligibility—Difference between inaccuracy and ambiguity of language.*

§ 226. It has been already stated,<sup>1</sup> and is indeed an obvious branch of the principle in question, that “parol,” or to speak more correctly, “extrinsic” evi-

<sup>1</sup> *Suprà*, § 223.

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Iowa, 387; *Caldwell v. May*, 1 Stew. (Ala.) 425; nor to show conversations between the parties before the contract was reduced to writing, with a view of establishing their intention. *Sayre v. Peck*, 1 Barb. (N. Y.) 464; *Pollen v. Le Roy*, 10 Bosw. (N. Y.) 38; *Bedford v. Flowers*, 11 Humph. (Tenn.) 242.

Indeed, when the contract is finally reduced to writing, all the prior agreements or conversations of the parties are merged therein, and the writing itself, so far as the contract and the intention of the parties thereto is concerned, becomes the exclusive evidence. *Cox v. Bennett*, 13 N. J. 165; *Crosier v. Acer*, 7 Paige (N. Y.), 137; *Smith v. Higbee*, 12 Vt. 113; *Downie v. White*, 12 Wis. 176; *Griswold v. Scott*, 13 Ga. 210.

In an action to recover for property taken in excess of that named in a written contract, as where a contract is for the cutting and taking of 100,000 feet of timber, it is not competent to show by parol that it was agreed that more might be re-cut. *Veeder v. Cooley*, 2 Hun (N. Y.) 77, as bearing.

But as has previously been stated, while this is generally the rule, yet there are many instances in which parol evidence is admissible to affect even the terms and effect of a written contract, and these instances should be borne in mind, as they are of the utmost value to every practicing lawyer, and may be the key to the successful issue of many lawsuits. Thus: Parol evidence is always admissible to show fraud practiced by either of the parties, even to the extent of showing that a part of the contract was fraudulently inserted therein, or that some of its terms and conditions are contrary to the actual agreement of the parties, and were inserted without the knowledge or consent of the party affected thereby. In this instance, of course, the burden is on the party setting up the fraud, to establish it fully, as the law presumes in favor of innocence and honest dealing, and unless there is a clear preponderance of evidence to establish the fraud, the claim must fail; *Pierce v. Wilson*, 34 Ala. 376; *Davis v. Stern*, 15 La. Ann. 176; *Hunter v. Bilyen*, 30 Ill. 228; *Sanford v. Handy*, 23 Wend. (N. Y.) 126; *Hamilton v. Congers*, 28

dence, is not *in general* receivable to contradict, vary, or explain written instruments. "It would be inconvenient," says one of our old books, "that matters in

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Ga. 276; *Farrell v. Bean*, 10 Md. 217; *Steamboat Co. v. Brown*, 54 Penn. St. 77; *Stark v. Littlepage*, 4 Rand. (Va.) 368; *Selden v. Myers*, 20 How. (U. S.) 506; *Van Buskirk v. Day*, 22 Ill. 260.

So also to show that a part of the provisions of the contract are not inserted therein, and when this fact is established, the whole contract is open to parol proof in favor of either of the parties thereto; *Phyfe v. Wardell*, 2 Edw. (N. Y. Ch.) 47; *Chetwood v. Britton*, 2 N. J. 438; *Watkins v. Stockett*, 6 H. & J. (Md.) 435; and this applies to all species of contracts, promissory notes included; *Elliott v. Connell*, 13 Miss. 91; *Koop v. Handy*, 41 Barb. (N. Y.) 454; but not when the note has gone into the hands of a *bona fide* holder for value, without notice of the fraud; *Scott v. Burton*, 2 Ashm. (Penn.) 312; *Christ v. Dffenbach*, 1 S. & R. (Penn.) 464; but these errors must be corrected on proceedings to reform the contract on the equity side of the court; *Fisher v. Dubert*, 54 Penn. St. 460; and in order to establish the fraud or mistake, parol evidence as to what was said by the parties just before and at the time of the execution of the contract is admissible. *Mallory v. Leach*, 35 Vt. 156.

So parol evidence is admissible to show that there is a mistake in the written contract, as in its date; *Arberry v. Nolan*, 2 J. J. Marsh. (Ky.) 421; *Causs v. Burgers*, 12 La. Ann. 142; so to correct a clerical error or any mistake that does not vary or alter the terms or conditions of the contract. *Leggett v. Buckhalter*, 30 Miss. 421; *Peterson v. Grover*, 20 Me. 363.

If the mistake claimed to exist is in the terms or conditions of the contract, parol evidence is not admissible in a court of law to show it, but the party must apply to the equity side of the court to have the contract reformed and made to correspond to the real agreement between the parties. *Gill v. Cloggett*, 4 Md. (Ch.) 470; *Fitzhugh v. Runyon*, 8 Johns. (N. Y.) 375; *Gower v. Sterner*, 2 Whart. (Penn.) 75; but in those states where courts of law are endowed with equity powers also, this may be done on the trial before the jury, but the error must be clearly set forth in the complaint or answer, with a proper prayer for the relief required. *Hebner v. Worrall*, 38 Penn. St. 376; *Renshaw v. Gans*, 7 id. 117.

Thus, in a court of law, evidence is not admissible to show a mistake in computation; *Morton v. Chandler*, 7 Me. 44; or to rectify an error in an original survey. *Cowan v. Harrod*, Litt. Sel. Cas. (Ky.) 4; or to show that a different sum was intended; *Cunningham v. Wren*, 23 Ill. 64; or that it varies from the terms of the original agreement. *Bradley v. Anderson*, 5 Vt. 152.

All such errors must be corrected on proceedings in equity to reform the contract, and the mistake must be clearly established if denied by the other party to the instrument. *Anderson v. Bacon*, 1 A. K. Marsh. (Ky.) 47; *Van Ness v. City of Washington*, 4 Pet. (U. S.) 232.

Parol evidence is always admissible in courts of law or equity to show that a

writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties,

contract is illegal and void, as that it is usurious; *Fenwick v. Ratcliffe*, 6 T. B. Monr. (Ky.) 154; or that it contravenes a law of the state or country where it was made. *Succession of Fletcher*, 11 La. Ann. 59.

So, too, to show that a note or contract is without consideration. *Corbin v. Sistrunk*; *Clark v. Houghton*, 12 Gray (Mass.), 38; *Luffburrow v. Henderson*, 30 Ga. 482; *Wynne v. Whisenant*, 37 Ala. 46; *Groesbeck v. Seeley*, 13 Mich. 329.

So to explain *latent* ambiguities in a contract, as to show to which of two things it applies; *Haris v. Doe*, 4 Blackf. (Ind.) 369; or to show what the intention of the parties was in a contract which, from defective punctuation, may be construed two ways; *Graham v. Hamilton*, 5 Ired. (N. C.) 428; so to explain what is meant by technical terms peculiar to a trade or business, evidence of experts is admissible to show what is meant by the term; *Branns v. Stearns*, 1 Or. 367; so where the ambiguity arises from reference to extrinsic objects, it may be explained by parol proof relative to these objects, but the court is to construe the contract as explained by such proof; *McCullough v. Wainwright*, 14 Penn. St. 171; so when an article is described in a note or contract, which does not exist, evidence of experts is admissible to show how such articles are usually spoken of in trade. *Pollen v. Le Roy*, 30 N. Y. 549.

So, too, parol evidence is admissible to show that an instrument, absolute on its face, was intended as a pledge or mortgage; *Leighman v. Marshall*, 17 Md. 550; *Johnson v. Sherman*, 15 Cal. 287; as that a written contract for the sale of lands was intended as a security for a loan or an antecedent debt; *Tibbs v. Morris*, 44 Barb. (N. Y.) 138; that a bill of parcels was intended as a mortgage merely; *Coswell v. Keith*, 12 Gray (Mass), 351; that an absolute deed was given as a security for a debt with a condition to reconvey on its payment; *Trucks v. Lindsey*, 18 Iowa, 504; *Hopper v. Jones*, 29 Cal. 18; *Sutphen v. Cushman*, 35 Ill. 186; that an absolute transfer of a vessel was intended as a mortgage; *Ward v. Beck*, 13 C. B. (N. S.) 668; but where a deed or other instrument on its face clearly appears to have been intended as a mortgage merely, parol evidence is not admissible to show that it was a conditional sale; the contract must be taken to express all the terms of the agreement between the parties thereto. *Wing v. Cooper*, 37 Vt. 169.

Parol evidence is admissible to establish an independent or collateral contract that is not repugnant to the written contract, and which does not alter, vary or control any of its express provisions. *Pomeroy v. Marvin*, 2 Paine, 476; *Phillips v. Preston*, 5 How. (U. S.) 278.

Thus, it may be shown that the original contract is discharged, or that a new and independent contract, founded on a new consideration, has been made by the parties to take the place of the written contract; but it must appear that the old contract has, to the extent that it is covered by the new one, been

to be proved by the uncertain testimony of slippery memory.”<sup>1</sup> But there are many cases where the rejection of such proof would be the height of injustice, and

<sup>1</sup> 5 Co. 26 a.

abandoned, as new provisions cannot be engrafted upon the written contract by parol. The new contract must be entire of itself, and take the place of the old one in the particular matter to which it relates; *Adler v. Friedman*, 16 Cal. 138; *Flanders v. Fay*, 40 Vt. 316; *Marshall v. Baker*, 19 Me. 402; so a new and distinct agreement on a new consideration may be shown by parol, whether it be a substitute for the written contract, or in addition to, or beyond it. *Shepherd v. Wysong*, 3 W. Va. 46; *Butler v. Smith*, 35 Miss. 457; *Hutchins v. Hubbard*, 34 N. Y. 24.

Thus, it may be shown that, by a parol agreement between the parties to a written contract, compensation for services, in addition to that named in the instrument, has been agreed upon; *Richardson v. Hooper*, 13 Pick. (Mass.) 446; that a note signed by one as surety was not to be binding, unless the signature of another person was obtained thereto; *Butler v. Smith*, *ante*; that the time for the performance of a contract has been extended; *Stearns v. Hall*, 9 Cush. (Mass.) 31; or any modification of a written contract, made upon a good consideration; *Holmes v. Douw*, 9 Cush. (Mass.) 135; so it may be shown that, by a subsequent agreement, a place of payment was agreed upon, or an agent appointed to receive the money. *Cummings v. Putnam*, 19 N. H. 569.

The rule in reference to subsequent parol agreements, changing the terms of a written contract, is, that such changes are valid and admissible in evidence when predicated upon a valid consideration, and when the original contract would have been valid if made by parol; but not when there is no consideration therefor, or when the original contract would be invalid if made by parol; *Rubber Co. v. Dunklee*, 30 Vt. 29; *Rigsbee v. Bowler*, 17 Md. 167; *Brock v. Sturdevant*, 12 Me. 81; *Dictator v. Heath*, 56 Penn. St. 290; so, too, collateral and independent facts, about which the written contract is silent, may be shown by parol. *Ruggles v. Swanwick*, 6 Minn. 526; *Van Buskirk v. Roberts*, 31 N. Y. 661.

Parol evidence is admissible to show a *waiver* of some provision of the contract; *Wood v. Perry*, 1 Barb. (N. Y.) 113; *Childs v. Jones*, 3 B. Monr. (Ky.) 51; *Willey v. Hall*, 8 Iowa, 62; *Leathe v. Bullard*, 8 Gray (Mass.), 545; as that a rate of interest agreed upon in a note or contract has been reduced; *Adler v. Friedman*, 16 Cal. 138; or that the time for payment or performance has been extended; *Parker v. Syracuse*, 31 N. Y. 376; and, generally, to show that *any* provision of the contract has been abandoned or rescinded; *Flynn v. McKeon*, 6 Duer (N. Y.), 203; *Parker v. Syracuse*, *ante*; *Bank v. Curtis*, 24 Me. 36; *Whitcher v. Shattuck*, 3 Allen (Mass.), 319; or that by a subsequent agreement between the parties, predicated on a new consideration, new

even be absurd. 1. With respect to the varying or explaining instruments there are two rules, "*Ambiguitas verborum patens nullâ verificatione excluditur*;"<sup>1</sup> "*Am-*

<sup>1</sup> Loft. Max. 249.

stipulations were added to the contract, or that the terms of the contract were varied. *Leeds v. Fursman*, 17 La. Ann. 32; *Rogers v. Atkinson*, 1 Ga. 12.

So where a contract is manifestly incomplete, although it embodies an agreement, yet, when it appears upon the face of the writing itself, that it only embodies a *part* of the contract between the parties, while the writing is conclusive as far as it goes, parol evidence is admissible to show what the contract between the parties was, as to those matters, not reduced to writing; *Winn v. Chamberlain*, 32 Vt. 318; *Webster v. Hodgkins*, 25 N. H. 128; as where A makes a contract in writing with B to sell him a certain amount of standing timber for a certain sum, parol evidence is admissible to show what tract the timber was to be taken from; *Pinney v. Thompson*, 3 Iowa, 74; so where there is a reference in a written contract to a verbal agreement between the parties, parol evidence is admissible to establish the verbal agreement, even though it adds material terms and conditions to the written contract. *Ruggles v. Swainvick*, 6 Minn. 526. But it must be remembered that it is only in cases where the contract itself shows that it rests partly in parol, that such evidence is admissible. The mere fact that the contract is defective is not enough. *Mussleman v. Stoner*, 31 Penn. St. 265; *Young v. Jacoway*, 17 Miss. 212. Where a writing does not purport to give the whole contract, and it is evident from an inspection of the instrument, that it was not intended as a contract, or to express all that was agreed upon between the parties, parol evidence is admissible to show an agreement *aliunde*. Thus, where A buys a horse of B, and upon payment of the price, B gives to A a writing in these words: "A bought of B a horse for the sum of \$25.00," signed B, this precludes A from denying the purchase or the price agreed upon, but it does not preclude him from showing that B warranted the horse to be sound. *Allen v. Pink*, 4 Mees. & Wels. 140. See, also, *Exr. of Corbin v. Sergeant*, 9 N. Y. S. C. 107, where it was held that an agreement for the sale of a farm might be shown, notwithstanding a bond and mortgage had been given by the purchaser in pursuance of the agreement, the court holding that the case did not fall within the rule that the contract should be shown by the written instrument, as such instrument did not purport to express the agreement.

In all other cases the verbal contract between the parties is regarded as merged in the written contract and no part of it can be shown to rest in parol. *Crane v. Elizabeth Ass'n, etc.*, 29 N. J. 302. Thus where a contract in writing for the sale and delivery of property is silent as to the time of delivery, parol evidence is admissible to show when the property was to be delivered; *Johnston v. McCrary*, 5 Jones, 369; and *where* it was to be delivered; *Mussleman v. Stoner*, 31 Penn. St. 265. So to show to whom credit was given when a doubt

biguitas verborum *latens* verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur." The following commentary by Lord Bacon on the

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in that respect fairly arises upon the face of the instrument; *Dessau v. Bourne*, 1 McAll. (U. S.) 20; *May v. Hewett*, 33 Ala. 161; *Smith v. Alexander*, 31 Mo. 193; or to identify the parties when there are two of the same name; *Mosely v. Martin*, 37 Ala. 216; *Henderson v. Hackney*, 23 Ga. 388; *Beauvais v. Wall*, 14 La. Ann. 199; *State v. Weare*, 38 N. H. 314; *Sawyer v. Boyle*, 21 Tex. 28; *Tuygle v. McMath*, 38 Ga. 648; *Hopkins v. Upsher*, 20 Tex. 89; or to identify the subject-matter of the contract when it is fairly doubtful to what it applies; *Cary v. Thompson*, 1 Daly (N. Y. C. P.), 35; *Mayor v. Butler*, 1 Barb. (N. Y.) 325; *Almyner v. Dulith*, 5 N. Y. 28; *Aldrich v. Eshleman*, 46 Penn. St. 420; to show what land is referred to in a deed or sheriff's levy; *Stewart v. Chadwick*, 8 Iowa, 463; *Doe v. Roe*, 20 Ga. 689; *Hughes v. Sandal*, 25 Tex. 162; to identify monuments referred to in a deed; *Robinson v. White*, 42 Me. 209; *Afferty v. Conover*, 7 Ohio St. 99; to prove that an action or prosecution is brought for the same matter covered by a previous judgment; *State v. Clemmons*, 9 Iowa, 534; as that water, the rights to which have been adjudicated in a former suit, is the same that is embraced in a later one; *Walsh v. Harris*, 10 Cal. 391; so to locate and identify land covered by a contract to convey, or described in a deed by general description as "lands now occupied by me;" *Brinkerhoff v. Alp*, 35 Barb. (N. Y.) 27; so to identify animals or other property sold under a written contract; *Marshall v. Gridly*, 46 Ill. 247; *Brooks v. Aldrich*, 17 N. H. 443; *Milvin v. Fellows*, 33 N. H. 401; or to identify wood covered by a bill of sale or mortgage; *Sargent v. Salberg*, 21 Wis. 132; *Rugg v. Hale*, 40 Vt. 138.

Parol evidence of the acts and declarations of the parties to a written contract after its execution, is admissible to show what interpretation they put upon it, as well as to show what conditions of it were waived. But such evidence is admissible for no other purpose, and cannot be used to alter, vary, enlarge or restrict the contract itself. *Barnaby v. Sauer*, 18 La. Ann. 148; *Knight v. N. E. Worsted Co.*, 2 Cush. (Mass.) 271; *Spencer v. Babcock*, 22 Barb. (N. Y.) 326; *French v. Hayes*, 43 N. H. 30; *Emery v. Webster*, 42 Me. 204; so when the meaning of the parties to a contract is not clear, it may be gathered from proof of extrinsic facts, such as the acts and conduct of the parties under it; *Farmers' Bank v. Winfield*, 24 Wend. (N. Y.) 419; *Lowry v. Adams*, 22 Vt. 160; as to show whether a memorandum at the foot of a contract was intended as a part of it; *Vergan v. McGregor*, 23 Cal. 339; whether it was intended to bind the principal or the agent by a contract; *R. R. Co. v. Middleton*, 20 Ill. 629; the purpose for which a note or account was assigned; *Cousins v. Westcott*, 15 Iowa, 253; or that a note, deed or contract was to be held in escrow. *Beale v. Poule*, 27 Md. 645.

To show that a written assignment of claims was intended for the joint benefit of the members of a firm, although made to one of them only;

latter of these maxims is the recognized basis of the law governing this subject.<sup>6</sup> "There be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the

<sup>1</sup> Bac. Max. of the Law, Reg. 23.

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Stone v. Aldrich, 43 N. H. 52; that an order drawn on a third person was to be paid in a certain kind of property; Hinneman v. Rosenback, 39 N. Y. 98; but such evidence is never admissible when the intention of the parties can be gathered from the instrument itself; Stevens v. Hays, 8 Ind. 277; and unless fraud is shown, parol evidence is never admissible to alter, vary, or change the terms of a written contract, as, that a promissory note should only be paid in a certain contingency; Hatch v. Hyde, 14 Vt. 25; Adams v. Wilson, 12 Metc. (Mass.) 138; Erwin v. Saunders, 1 Cow. (N. Y.) 249; Swank v. Nichols, 24 Ind. 199; Foy v. Blackstone, 31 Ill. 528; Boody v. McKinney, 23 Me. 517; or that a draft payable, generally was to be paid at a particular bank; Patten v. Newell, 30 Ga. 271; or that a note payable in installments was to become due on failure to pay an installment; Blakeman v. Wood, 3 Sneed (Tenn.), 512; or that a note was renewed upon a condition which has not been complied with; Warren Academy v. Starrett, 15 Me. 443; or that a note was intended as a receipt; Billings v. Billings, 10 Cush. (Mass.) 178; City Bank v. Addins, 45 Me. 455; or that payment of a note was not to be enforced so long as the interest was paid; Church v. Stetson, 5 Pick. (Mass.) 506; or that a guardian's note was not to be paid unless there were assets of the ward in his hands; Aren v. Hoffman, 41 Miss. 616; or that it is payable in any thing but money; Larg v. Johnson, 24 N. H. 302; Bank v. Keep, 13 Wis. 209; Cockerell v. Kirkpatrick, 9 Mo. 697; Woodin v. Foster, 16 Barb. (N. Y.) 146; or that the value of certain property, when ascertained, should be credited on the note; Featherstone v. Wilson, 4 Ark. 154; or that the note was to be paid at a different place or on a different day from that named therein; Brown v. Wiley, 20 How. (U. S.) 442; Eaton v. Emerson, 14 Me. 335; or to change a word or its ordinary meaning, used in a note, as "if" to "when;" Garten v. Chandler, 2 Bibb (Ky.), 246; or that it is payable in any other mode than that appearing on its face; Field v. Stinson, 1 Cold. (Tenn.) 40; or that a surety signed the note only upon the condition that it was to be collected promptly at maturity; Thompson v. Hall, 45 Barb. (N. Y.) 214; or that it was only to be paid on a contingency; Bidwell v. Thompson, 25 Tex. 245; or that the signers of a note acted in any other capacity than that designated by their signature thereto. Hyatt v. Simpson, 8 Ind. 156. Neither is it competent to vary or alter the relations of an indorser of a note or bill by parol proof; Buckley v. Bently, 48 Barb. (N. Y.) 283; Crocker v. Getchett, 23 Me. 392; Mason v. Graff, 35 Penn. St., 448; Kern v. Van Pheel, 7 Minn. 426; Barry v. Morse, 3 N. H. 132; Meyer v. Beardsley, 30 N. J. 236; or to show what is intended by an indorser who writes "notice of protest waived by me;" Buckley v. Bentley, 42 Barb. (N. Y.) 646; or that the note was given for certain property which the maker had a right to return within a certain time, and on

other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for any thing

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the return of which the note was to be given up; *Allen v. Forbush*, 4 Gray (Mass.), 504; or that the note was given for land, and that a part of the land agreed to be conveyed was not embraced in the deed; *Bennett v. Ryan*, 9 Gray (Mass.), 204; or that an indorser signed only as guarantor; *Wright v. Morse*, 9 id. 337; or that a check was given upon the express understanding that it was to be paid in the bills of a certain bank; *Park v. Thomas*, 21 Miss. 11; or upon a condition that has failed; *Rose v. Learned*, 14 Mass. 154; or to show that it was agreed when the indorser indorsed the note that he should not be liable; *Sands v. Woods*, 1 Iowa, 263; or that a note was given as a memorandum merely, which was not to be paid except as he collected the amount of another party; *McClanahan v. Hinds*, 2 Strobb. (S. C.) 122; or that a note or due bill given on demand was not to be paid until a certain time; *Van Allen v. Allen*, 1 Hill (N. Y. C. P.), 524; or that the payee agreed to make a deduction from a note in a certain contingency; *Goodard v. Hill*, 33 Me. 582; but it has been held that when the indorsement is in blank it may be explained by parol; *Harris v. Pierce*, 6 Ind. 162; *Taylor v. Kirn*, 18 Iowa, 485; *Smith v. Barber*, 1 Root (Conn.), 207; as that there was a verbal agreement between the indorser and indorsee that there should be no recourse to the indorser in case of non-payment; *Girard Bank v. Gomley*, 2 Miles (Penn.), 405; but this is restricted to actions between the indorser and indorsee, and even in such cases, the policy of the rule is doubtful and inconsistent with the general principle that parol evidence is inadmissible to vary the terms of a written contract. When a person indorses his name upon the back of a note, he becomes a party to the note, and a surety for its payment. If he would restrict his liability, he should do so by the terms of his indorsement, and not allow it to rest in parol. The very fact that a contract of that character, so important to the indorser, is left to rest in parol, evinces a fraudulent purpose, which the law should not tolerate or uphold. It opens the door to perjury, and enables the indorsee to foist, upon an innocent party, a contract apparently absolute upon its face, when in fact it is transmitted with conditions that strip it of one of the most essential elements of its value.

In the case of a blank indorsement, a party cannot convert the indorser into a guarantor by writing a guaranty over his signature, except upon positive proof of authority to do so. *Cottrell v. Conklin*, 4 Duer (N. Y.), 45.

It has been held that a person who signs a note with another, joint on its face, may show that he signed it as surety simply, and that the payee knew the fact; *Emmons v. Overton*, 18 B. Monr. (Ky.) 643; *Riley v. Gregg*, 16 Wis. 666; *Pollard v. Stanton*, 5 Ala. 451; *Adams v. Flanagan*, 36 Vt. 400; *Bank v. Kent*, 4 N. H. 221; *Bank v. Mumford*, 6 Ga. 44; *Watkins v. Kilpatrick*, 26 N. J. 84; *Ward v. Stout*, 32 Ill. 399; *Lacey v. Lofton*, 26 Ind. 324; *Hecksher v. Binney*, 3 Woodf. & M. (U. S.) 333; but not to show that his liability was lim-



that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas \*patens* is never [ \* 313 ] holpen by averment, and the reason is because

ited; *Bell v. Shipley*, 6 N. Y. 33; but as between the original makers of the note, the extent of the liabilities of each, as agreed upon between themselves, may be shown. *Hunt v. Chambliss*, 15 Miss. 532.

So, as between the maker and payee of a note, it has been held, that when no place of payment was named, it might be shown that it was agreed that payment should be demanded at a certain place; *Brent v. Bank of the Metropolis*, 1 Pet. (U. S.) 92; or at the place where the note is payable; *McKee v. Boswell*, 33 Mo. 567; or an agreement to receive in part payment a debt due from another person; *Murchie v. Cook*, 1 Ala. 41; or to show that the note was given as a substitute for one upon which the maker was surety; *Rawlings v. Fisher*, 24 Md. 52; or to show an agreement between the indorser and indorsee that an action on an overdue note should not be brought for a certain time against the maker; *Friend v. Beebe*, 3 Iowa, 279; to identify a note referred to, but misdescribed, in an assignment or mortgage; *Pierce v. Parker*, 4 Metc. (Mass.) 80; or that a note signed by one member of a firm was given on account of the partnership; *Owings v. Trotter*, 1 Bibb (Ky.), 157; to show that extra interest was agreed upon, and that certain payments made were to apply on that; *Rohan v. Hunson*, 11 Cush. (Mass.) 44; to show an agreement to extend the time of payment; *Peck v. Beckwith*, 10 Ohio, 497; or that the note is secured by a deed of trust; *Fitzpatrick v. School Commissioners*, 7 Humph. (Tenn.) 224.

So it is always competent to show the real consideration of a bill, note or other contract, and a failure of such consideration, when the consideration is not described therein; *Slade v. Halstead*, 7 Cow. (N. Y.) 322; *Simonton v. Steele*, 1 Ala. 357; *Mattask v. Livingston*, 17 Miss. 489; *Cross v. Rowe*, 22 N. H. 77; *Western v. Pollard*, 16 B. Monr. (Ky.) 15; *Baker v. Gregory*, 28 Ala. 544; *Herrick v. Bean*, 20 Me. 51; *Knight v. Knight*, 28 Ga. 165; as to bills of sale: *Clinton v. Estes*, 20 Ark. 216; *Wheeler v. Billings*, 38 N. Y. 263; bonds: *Baldwin v. Carter*, 17 Conn. 201; *McCulloch v. McKee*, 16 Penn. St. 289; contracts: *Aurora v. Cobb*, 21 Ind. 492; *Smith v. Conrad*, 15 La. Ann. 579; *Warren v. Walker*, 23 Me. 136; but not when the real consideration is named therein, as "for the rent of house" or the "hire of a slave;" *Newton v. Jackson*, 23 Ala. 335; *Gazzaway v. Moore*, Harp. (S. C.) 401; but see *contra*, *Marsh v. Lisle*, 34 Miss. 173.

So, when no time, place or manner of the performance of a written contract is named, they may be shown by parol. *Strange v. Wilson*, 17 Mich. 342; *Benson v. Peebles*, 5 Mo. 132.

So parol evidence is always admissible to show a custom or usage applicable to a certain trade or business, and that, too, with the purpose and view of con-

the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to

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trolling the contract itself, and aiding in its interpretation and the effect to be given to it; but the custom must be well established and so general that every person dealing in reference to matters affected by it may fairly be presumed to contract in reference to it. But such proof is not admissible when the custom or usage is inconsistent with the language or terms of the contract itself; *Lombardo v. Case*, 45 Barb. (N. Y.) 95; *Oelrichs v. Ford*, 23 How. (U. S.) 49; *Harvey v. Cady*, 3 Mich. 431; *Walsh v. Mississippi, etc., Co.*, 52 Mo. 434; nor unless the custom is reasonable and consistent with the general principles of law. *Wadleigh v. Davis*, 63 Barb. (N. Y.) 501; *McMasters v. Pennsylvania Railroad Co.*, 69 Penn. St. 374.

Thus it has been held that, where a word is used in a contract, which the court is unable to construe without explanation, it is proper to admit evidence of the peculiar use and meaning of the words in a particular business to which the contract relates; *Cowles v. Garrett*, 30 Ala. 341; *Harb v. Hammett*, 18 Vt. 127; *Calwell v. Lawrence*, 24 How. Pr. (N. Y.) 324; *Hulbert v. Cowen*, 37 Barb. (N. Y.) 62; *Smith v. Clayton*, 29 N. J. 357; *Myers v. Walker*, 24 Ill. 133; *Williams v. Wood*, 16 Md. 220; *Brown v. Brooks*, 25 Penn. St. 210; *Stewart v. Smith*, 28 Ill. 397; *Hite v. State*, 9 Yerg. (Tenn.) 357; *Wait v. Fairbanks*, 1 Brayton (Vt.), 77; *Stone v. Bradbury*, 14 Me. 185; *Locke v. Rowell*, 47 N. H. 46; *Fitch v. Carpenter*, 43 Barb. (N. Y.) 40; *Ganson v. Madigan*, 15 Wis. 144; *Barron v. Placide*, 7 La. Ann. 229.

A custom of a trade may be given in evidence to explain, but not to vary the terms of a written contract; *Rowland v. Hegeman*, 1 Hun (N. Y.), 491; as to show what is meant by "good merchantable hay;" *Fitch v. Carpenter*, 43 Barb. (N. Y.) 40; or "good custom cowhide boots;" *Wait v. Fairbanks*, 1 Brayton (Vt.), 77; or a "farm" or "homestead farm" in a lease; *Locke v. Rowell*, 47 N. H. 46; or that a right to "deepen a ditch" includes the right to widen it; *Collins v. Driscoll*, 34 Conn. 43; or the "usual and customary method of engaging and paying a fishing crew, to establish the kind of voyage contemplated;" *Eldredge v. Smith*, 13 Allen (Mass.), 140; to show what particular word an abbreviation is intended to represent; *Hite v. State*, 9 Yerg. (Tenn.) 357; to show what is meant by the word *team* in a contract; *Ganson v. Madigan*, 15 Wis. 144; to show what is meant by "dangers of the river" in a bill of lading; *Sampson v. Gozzam*, 6 Port. (Ala.) 123; or the number of hours regarded as a "day's work" in a particular trade; *Barnes v. Ingalls*, 39 Ala. 193; or that a certain description of contracts in writing, by the custom of the business, is regarded as a bond; *Stone v. Bradbury*, 14 Me. 185; also what is meant by "currency" when used in a note or contract. *Pilmer v. State Bank*, 16 Iowa, 321.

But, while the evidence of experts is admissible for such purposes, they are not permitted to testify as to the *construction* of a contract; *Collier v. Col-*

make all deeds hollow and subject to averments, and so in effect that to pass without deed which the law appointeth shall not pass but by deed. Therefore if a man give

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lins, 17 Abb. Pr. (N. Y.) 467, or to excuse non-compliance with the provisions of an express stipulation of a contract; *Harvey v. Cady*, 3 Mich. 431; nor can a special custom be proved, as the rules and usages of the land office; *Hammond v. Warfield*, 2 H. & J. (Md.) 151; or what is meant by the words "current funds;" *Osgood v. McConnell*, 32 Ill. 74; *Marc v. Kupper*, 34 Ill. 287; *Ehle v. Chittenango Bank*, 24 N. Y. 548; nor that the parties agreed that the contract should be subject to a special custom; *Oelrich v. Ford*, 23 How. (U. S.) 49; nor can a custom or usage be proved to explain a written contract when it is susceptible of a reasonable interpretation without such proof; *Cabot v. Winsor*, 1 Allen (Mass.), 546; *Ins. Co. v. Wright*, 1 Wall. (U. S.) 456; nor one which is inconsistent with the contract; *Boon v. The Belfast*, 40 Ala. 184; *Sanford v. Rawling*, 43 Ill. 92; *Lombard v. Case*, *ante*; neither is it competent to show what was said by the parties prior to the execution of a written contract for the purpose of showing what they intended by a technical term or word used therein. If the meaning cannot be otherwise arrived at, it must be shown by the evidence of experts familiar with the matter to which it relates; *Martin v. Thrasher*, 40 Vt. 460; neither is the understanding of the party who drew the instrument, as to the intention of the parties, admissible; *Fox v. Foster*, 4 Penn. St. 119; nor is the understanding which either party had of the meaning of the contract admissible, unless communicated to the other party, or the circumstances are such as to establish positive fraud; *Taft v. Dickenson*, 6 Allen (Mass.), 553; *Moody v. McCowan*, 39 Ala. 586.

Bills of lading are regarded as of a dual nature, being both receipts and contracts, and, so far as they partake of the nature of receipts, parol evidence is admissible to explain or vary them; as to that extent, they are only regarded as *prima facie* evidence; *Steamboat Missouri v. Webb*, 9 Mo. 193; *Sutton v. Kettell*, 1 Sprague, 309; *The Tuskut*, *id.* 71; *Great Western R. R. Co. v. McDonald*, 18 Ill. 172; *Hendricks v. Steamer Morning Star*, 18 La. Ann. 353; *Baltimore, etc., Steamboat Co. v. Browne*, 54 Penn. St. 77; *O'Brien v. Gilchrist*, 34 Me. 554; *Atwell v. Miller*, 11 Md. 348; *Graves v. Harwood*, 9 Barb. (N. Y.) 77; *McTyer v. Steele*, 26 Ala. 487; *Wolfe v. Myers*, 3 Sandf. (N. Y.) 7; but, so far as the bill expresses the actual contract between the carrier and shipper, parol evidence is not admissible to alter, vary or explain it. *McTyer v. Steele*, *ante*; *Steamboat Missouri v. Webb*, 9 Mo. 193; *Cheeny v. Holly*, 14 Wend. (N. Y.) 26; *Jones v. Warner*, 11 Conn. 40; *Cox v. Paterson*, 30 Ala. 608; *Arnold v. Jones*, 26 Tex. 335; *Shaw v. Gardner*, 12 Gray (Mass.), 488; *Gardner v. Chase*, 2 R. I. 112; *White v. Van Kirk*, 25 Barb. (N. Y.) 16.

Thus it is held that a bill of lading or railroad receipt which states that the goods were received in good order, is to that extent only a receipt, and does not estop the carrier from showing that the goods were really in a damaged condi

land to I. D., et I. S. et hæredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance

tion. But such proof must be confined to defects not known to the carrier when the receipt was given. *Blade v. Chicago, etc., R. R. Co.*, 10 Wis. 4.

So to show an error or mistake as to the quantity of goods; *Graves v. Howard*, 9 Barb. (N. Y.) 477; so, where it is signed by an agent, to show who the principal is. *Goddard v. Mullany*, 52 Barb. (N. Y.) 87. But representations made by the carrier before the bill of lading was executed, as to the depth of water at the place of landing, cannot be given in evidence by him to excuse his liability for a loss of the goods, or injury thereto. *Shaw v. Gardner*, 12 Gray (Mass.), 488; nor that an additional quantity of goods should be carried. *Sayward v. Stevens*, 3 id. 97; or that the rate of transportation was to be dependent upon the price obtained for the goods. *Gardner v. Chase*, 2 R. I. 112; nor indeed in *any* case, where the effect of the evidence is to vary the terms of the contract as expressed in the bill. *Arnold v. Jones*, 26 Tex. 335; *White v. Van Kirk*, 25 Barb. (N. Y.) 16; but a bill of lading may be varied by a subsequent parol agreement, and to establish such supplemental contract may be shown by parol evidence. *Atwell v. Miller*, 11 Md. 348.

Bills of sale, absolute upon their face, cannot be shown by parol to be in fact only intended as collateral security, particularly where the rights of third persons will be affected by such proof. *Sanborn v. Chittenden*, 27 Vt. 171; *Champlin v. Butler*, 18 Johns (N. Y.) 169; *Hazard v. Loring*, 10 Cush. (Mass.) 269; *Hayward v. Wallace*, 4 Strobb. (S. C.) 181. But in order to exclude such proof, they must express a contract; a mere bill of goods, as that A. bought of B. certain articles at a certain price, 6 per cent<sup>4</sup> off for cash, is not a contract, and is open to parol proof to show any fact connected with and material to the transaction. *Linsley v. Lovely*, 26 Vt. 123; *Silliman v. Tuttle*, 45 Barb. (N. Y.) 171; *Filkins v. Whyland*, 24 N. Y. 338; *Dana v. Fiedler*, 12 id. 40; *Wentworth v. Buhler*, 3 E. D. Smith (N. Y. C. P.), 305. Where, however, the bill of sale is in the nature of a contract, it is, like all other contracts, presumed to embody all that was agreed upon between the parties, and is not open to explanation by parol, but is subject to the same rules in this respect as other contracts. Thus, where a sale of property reduced to writing contains all the elements requisite to show a contract between the parties, but contains no warranty of the goods, parol proof is not, in the absence of fraud, admissible to show a warranty in fact. *Houghton v. Carpenter*, 40 Vt. 588; *Jolliffe v. Collins*, 21 Mo. 338; *Heyward v. Wallace*, 4 Strobb. (S. C.) 181; *Pickard v. McCormick*, 11 Mich. 68. So where a business with all the good will belonging thereto is conveyed by a bill of sale, parol proof is not admissible to show that the vendor agreed not to establish a similar business in the town. *Smith v. Gibbs*, 44 N. H. 335; or to show that a bill of sale was merely intended as a trust. *Owen v. Sharp*, 12 Leigh (Va.), 427; *Trumbo v. Cartwright*, A. K. Marsh.

should be limited. So if a man give land in tail, though it be by will, the remainder in tail, and add a proviso in this manner : Provided that if he, or they, or any of them

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(Ky.) 532; or that it was merely intended as an assignment. *Frasier v. Sneath*, 3 Nev. 120; or that a sale was made by two persons when the bill of sale was only executed by one. *Wren v. Wardlaw*, Minor (Ala.), 363; or that it was given merely to enable the vendee to get possession of the property as agent of the vendor. *McClenney v. Floyd*, 10 Tex. 159; or that it was intended to embrace other property than that named therein; *McCloskey v. McCormick*, 37 Ill. 66; or that property within its provisions was in fact excepted. *Id.*; *Harrell v. Dorrance*, 9 Fla. 490; nor to show that the title and possession of the property was not to vest in the vendee immediately; *Rennell v. Kimball*, 5 Allen (Mass.), 356; nor in fact to vary in any respect the terms or conditions of the sale. *Peaslee v. Stafford*, 1 N. Chip. (Vt.) 173; *Davis v. Moody*, 15 Ga. 175. But it must be remembered that, in order to exclude such proof, the bill of sale must contain all the essential elements of a contract, leaving nothing open to parol proof. As to whether it is a contract which the courts can reasonably construe, is a question for the court. *Houghton v. Carpenter*, 40 Vt. 588; *Pickard v. McCormick*, 11 Mich. 68; *Linsley v. Lovely*, 26 Vt. 123.

The rule that parol evidence will not be received to vary, explain or control a written instrument is confined entirely to actions between the parties thereto, or their privies in interest. In actions between strangers thereto, the *real* facts may be shown, or any fact that changes the legal effect of the contract, or shows the real intention, object or purpose of the contract; and this is the rule also in cases where the contract is offered in evidence in an action between a stranger to the contract and one of the parties thereto; *Venable v. Thompson*, 11 Ala. 147; *Stradder v. Lambeth*, 7 B. Monr. (Ky.) 589; *Van Eman v. Starchfield*, 10 Minn. 255; *Thomas v. Truscott*, 53 Barb. (N. Y.) 200; *Woodman v. Eastman*, 10 N. H. 359; *Hughes v. Sandall*, 25 Tex. 162; *Bareda v. Silsbee*, 21 How. (U. S.) 146; *Blake v. Hall*, 19 La. Ann. 49; *Forbush v. Goodwin*, 25 N. H. 425; *Reynolds v. Magness*, 2 Ired. (N. C.) 26; nor does it apply in actions between the sureties, as they are not regarded as estopped, by the provisions of the contract, from showing any agreement between themselves, or the party for whom they became surety. The rule is confined exclusively to the parties actually contracting as principals. *Thomas v. Truscott*, *ante*. From the time that a transaction is begun until it is ended, any thing that is said or done by the parties in reference to it may be said to be a part of the transaction itself, and consequently a part of the *res gestæ*, and if it has any tendency to explain, or throw light upon the transaction, is admissible in evidence as such. *Fifield v. Richardson*, 34 Vt. 410; *Carlton v. Patterson*, 29 N. H. 580. Thus, where money is sent by a debtor to his creditor by a third person, the declaration or statement of such third person as to the application

do any, &c., according to the usual clauses of perpetuities, it cannot be averred, upon the ambiguities of the reference of this clause, that the intent of the devisor was that the restraint should go only to him in the remainder, and the heirs of his body; and that the tenant in tail in possession was meant to be at large. Of these, infinite cases might be put, for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty. But if it be *ambiguitas latens*, then otherwise it is: as if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all; but if the truth be that I have the manors both

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to be made of the money, and that the same is to be applied upon a particular demand, are admissible as a part of the *res gestæ*; *Gay v. Gay*, 5 Allen (Mass.), 157; but conversations had *after* a transaction is finally closed, even though they relate to the transaction itself, and are had *within a few moments after the transaction is ended*, are not admissible; *Osborn v. Robbins*, 37 Barb. (N. Y.) 481; *Battles v. Batchelder*, 39 Me. 19; so it has been held that where a person is indicted for an assault with intent to commit a rape, made upon a young child, statements of the child made shortly after the assault as to what occurred, is not admissible as a part of the *res gestæ*. *People v. Graham*, 21 Cal. 261. Instructions given by a principal to his agent are a part of the *res gestæ*; *Nelson v. Smith*, 28 Ill. 495; so the remarks of a person at the very time when an injury is received by him. *Frink v. Coe*, 5 Greene (Iowa), 555. The acts and declarations of parties to a contract at the time it is entered into, or that really and fairly form a part of it, are always admissible as a part of the *res gestæ*; but in the acts and declarations before or after its execution, not forming a part of the transaction itself, are no part of the *res gestæ*, and are not admissible except in special instances and for special purposes.

It cannot be expected that I can in these notes give all the instances in which parol evidence has been held admissible to control in any measure the effect of written contracts; for such instances are numerous, and the conflict of authorities is so great as to render the task not only laborious, but one which cannot be fairly executed, in the brief space allotted to the annotation of any book.

of South S. and North S. this ambiguity is matter in fact, and therefore it shall be holpen by averment, whether of them was that the party intended should pass. So if I set forth my land by quantity, then it shall be supplied by election, and not averment. As if I grant ten acres of wood in Sale where I have 100 acres, whether I say it in my deed or no, that I grant out of my 100 acres, yet here shall be an election in the grantee, which ten he will take. And the reason is plain, for \*the presumption of the law is, where the thing is only nomina- [ \* 314 ] ted by quantity, that the parties had indifferent intentions which should be taken, and there being no cause to help the uncertainty by intention, it shall be holpen by election. But in the former case the difference holdeth where it is expressed and where not; for if I recite, Whereas I am seized of the manor of North S. and South S., I lease unto you *unum manerium de S.* there it is clearly an election. So if I recite, Where I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*, there it is an election, not averment of intention, except the intent were of an election, which may be speciall averred. Another sort of *ambiguitas latens* is correlative unto these: for this ambiguity spoken of before, is when one name and appellation doth denominate divers things, and the second, when the same thing is called by divers names. As if I give lands to Christ Church, in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words: for this variance is matter in fact, but the averment shall not be of intention, because it doth stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands

with the words: but so it is not in variance, and therefore the averment must be of matter that do endure quantity and not intention. As to say of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was that the grant should be to Christ Church in that University of Oxford." A host of cases on this subject, with numerous qualifications and distinctions, are to be found in the books.<sup>1</sup> We will merely add the following important \*observations from the work of Vice-  
 [ \* 315 ] Chancellor Wigram, "Extrinsic Evidence in the Interpretation of Wills," § 200 *et seq.* 4th Ed. "A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only, if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous, because they are unintelligible to a man who cannot read; nor can they be ambiguous, merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow — that the question, whether a will is ambiguous, might be dependent, not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy,—a proposition too absurd for an argu-

<sup>1</sup> See the cases collected in 2 Phill. Ev. chap. 8, 10th Ed.; and Wigram's "Extrinsic Evidence in the Interpretation of Wills," 4th Ed.



ment. \* \* \* Again, a distinction must be taken between *inaccuracy* and *ambiguity* of language. Language may be *inaccurate* without being *ambiguous*, and it may be *ambiguous* although perfectly accurate. If, for instance, a testator having one *leasehold* house in a given place, and no other house, were to devise his *freehold* house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage, \*are cases in which no ambiguity really exists. The [ \* 316 ] meaning is certain, notwithstanding the inaccuracy of the testator's language."

*Admissible to impeach written instruments for duress, menace, fraud, covin, or collusion.*

§ 227. There are some other exceptions to the rule rejecting extrinsic evidence to affect written instruments. Foremost among them come those cases where it is sought to impeach written instruments as having been obtained by duress,<sup>1</sup> menace,<sup>2</sup> fraud, covin, or collusion;<sup>3</sup> which, as is well known, vitiate all acts, however solemn, or even judicial.<sup>4</sup> "Non videtur consensum reti-

<sup>1</sup> Dig. lib. 50, tit. 17, l. 116; Perkins, § 16; Bac. Max. Reg. 6; 6 Ho. Lo. Cas. 44, 45; 11 Q. B. 112; 2 Exch. 395; 6 Exch. 67.

<sup>2</sup> Dig. in loc. cit.; Bac. Max. R. 22; Shep. Touch. 61; 11 A. & E. 990; 6 Q. B. 280.

<sup>3</sup> Dig. lib. 44, tit. 4; Gilbert. Corp. Jur. Can. Prolegom. Pars Post, pp. 27 & 28.

<sup>4</sup> That judicial acts may be impeached for fraud, see bk. 3, pt. 2, ch. 9.

nuisse si quis ex præscripto minantis aliquid immutavit”<sup>1</sup> — “Dolus et fraus nemini patrocinantur”<sup>2</sup> — “Jus et fraus nunquam cohabitant”<sup>3</sup> — “Qui fraudem fit frustrà agit”<sup>4</sup> — “Dolus circuitu non purgatur.”<sup>5</sup> The rejection of parol or other extrinsic proof in such cases would be applying the rule in question to a purpose for which it was never meant, and rendering it a protection to practices which the law intends to suppress. But the party to an instrument is estopped from setting up his own fraud, &c., to avoid the instrument;<sup>6</sup> as also are those claiming under him; and the like rule holds in the case of menace or duress.<sup>7</sup> These principles [ \* 317 ] \*are found in the laws of other countries as well as our own, — <sup>8</sup> (a)

“—— Nec lex est justior ulla,

Quàm necis artifices arte perire suâ.”<sup>9</sup>

<sup>1</sup> Bac. Max. Reg. 22.

<sup>2</sup> M. 30 Edw. III. 32; 14 Hen. VIII. 8 A.; 39 Hen. VI. 50, pl. 15; 1 Keb. 546.

<sup>3</sup> 10 Co. 45 a.

<sup>4</sup> 2 Roll. 47.

<sup>5</sup> Bacon, Max. Reg. 1.

<sup>6</sup> 2 Phil. Ev. 360, 10th Ed. See bk. 3, pt. 2, ch. 7.

<sup>7</sup> Bracton, lib. 2, c. 5, fol. 15 b; Dyer, 143 b, pl. 56; Plowd. 19; Shep. Touch 60, 61; *Atlee v. Backhouse*, 3 M. & W. 650, per Parke, B.

<sup>8</sup> Dig. lib. 4, tit. 2; Cod. lib. 8, tit. 54, l. 27; Lancel. Inst. Jur. Canon. lib. 2, tit. 25, § 13; Domat, Lois Civiles, Part 1, liv. 3, tit. 6, sect. 2, § 5; Code Civil, Liv. 3, tit. 3, chap. 6, sect. 3, § 2, art. 1353; Bonnier, Traité des Preuves, § 643, &c.

<sup>9</sup> 1 H. Bl. 585.

(a) Parol evidence is admissible to show that a written contract was obtained by fraud as that a material clause has been inserted therein by one party without the knowledge or consent of the other party; *Baltimore Steamboat Co. v. Brown*, 54 Penn. St. 77; *Holbrook v. Burt*, 22 Pick. (Mass.) 546; *Townsend v. Cawler*, 31 Ala. 428; *Selden v. Myers*, 20 How. (U. S.) 506; *Buck v. Appleton*, 14 Me. 284; *Watson v. James*, 15 La. Ann. 886; *Stark v. Littlepage*, 4 Rand. (Va.) 368; or when a material part of the contract is fraudulently omitted from the written contract, and in either case, when the fraud is established, the whole contract is open to parol proof; *Phyfe v. Wardell*, 2 Edw. Ch. (N. Y.) 47; *Watkins v. Stockett*, 6 H. & J. (Md.) 435; *Elliott v. Connell*, 13 Miss. 91;

*Evidence of usage to explain written instruments.*

§ 228. Another exception is to be found in the admissibility of the evidence of *usage*; “Optimus interpret rerum usus.”<sup>1</sup> “Magister rerum usus.”<sup>2</sup> “Consuetudo loci est observanda.”<sup>3</sup> Many of the cases on this subject will be found collected in Broom’s *Maxims*, pp. 882–896, 4th Ed.; and the general principles by which it is governed are thus clearly laid down in a work of authority. “Evidence of usage has been admitted, in aid of the construction of written instruments. This evidence has been received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind, — when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost a foreign language. The terms used in these instruments are to be interpreted according

<sup>1</sup> 2 Inst. 282.

<sup>2</sup> Co. Litt. 229 b.

<sup>3</sup> 6 Co. 67 a; 7 Id. 5 a; 10 Id. 140 a.

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Chetwood v. Brittain, 2 N. J. 438; and in order to make such evidence admissible, the fraud must be clearly established; *Selden v. Myers, ante*; *McMahon v. Spangler*, 4 Rand. (Va.) 51; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; and where a party relies upon fraud or misrepresentation to avoid a contract, he takes the burden of establishing the fact by clear and satisfactory proof; *Walker v. Smith*, 2 Vt. 539; *Bank v. Gibson*, 5 Duer (N. Y.), 574; *Smalley v. Hale*, 37 Mo. 102; *Morris v. Whitmore*, 27 Ind. 418; *Trustees v. Hill*, 12 Iowa, 462; *Taylor v. Moore*, 23 Ark. 408; *Gordon v. Parmalee*, 15 Gray (Mass.), 413; *Shackleford v. Newington*, 46 N. H. 415; and the same is true where duress, illegality, usuriousness, want of consideration or any defense going to defeat the contract is set up. *Wyman v. Fiske*, 3 Allen (Mass.), 238; *Shackleford v. Newington*, 46 N. H. 415; *Dunning v. Pratt*, 4 Duer (N. Y.), 331; *Brown v. Munger*, 16 Vt. 12; *Morton v. Rogers*, 14 Wend. (N. Y.) 575; *Nelson v. Eaton*, 26 N. Y. 410.

to the recognized practice and usage, with reference to which the parties are supposed to have acted; and the sense of the words, so interpreted, may be taken to be the appropriate and true sense intended by the parties.”<sup>1</sup> “Evidence of usage has been admitted in contracts relating to transactions of commerce, trade, farming or other business, — for the purpose of defining what would otherwise be \*indefinite, or to interpret a peculiar [ \* 318 ] term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them, or with the relations growing out of them; and the evidence in such cases is admitted, with the view of giving effect, as far as can be done, to the presumed intention of the parties. Where the language of the contract itself manifests an intention to exclude the operation of usage, evidence of usage cannot be admitted. And in all cases in which this evidence is admitted, it must be presumed that the usage was known to the contracting parties, and that they contracted in reference to it, and in conformity with it.” With this understanding, the reception of evidence of usage is not only justifiable in principle, but absolutely necessary; and without it, the intention of the parties would be often defeated. Usage may be proved, though not general; it may be local, and to a small extent — or professional — or only in a particular branch of business, or among a particular class of persons. Even the usage, or rather the practice, of an individual firm with which a party has contracted, may be resorted to as a medium of exposition, if it may be reasonably inferred that he contracted in

<sup>1</sup> 2 Phill. Ev. 407, 10th Ed. See, also, 2 Stark. Ev. 361, 3rd Ed.

<sup>2</sup> See, as to this, *Kirchner v. Venus*, 12 Moo. P. C. 361, 399.

reference to such practice.”<sup>1</sup> “The rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to or inconsistent with the written contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication.”<sup>2</sup> Again, “If the language of ancient charters is become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted \*to for the purpose of explanation, though it can never be admitted to control or contradict the [ \* 319 ] express provisions of the instrument. Such continued usage is a strong practical exposition of the meaning of the parties.”<sup>3</sup>(a)

*Interlineations, erasures, &c., in written documents.*

§ 229. It seems a rule of universal jurisprudence that imperfections or blemishes apparent on the face of a document, such as interlineations, erasures, &c., do not vitiate the document, unless they are in some *material* part

<sup>1</sup> 2 Phill. Ev. 415-16, 10th Ed.

<sup>2</sup> Id. 417.

<sup>3</sup> 2 Phill. Ev. 419, 10th Ed.

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(a) Evidence of a well-established custom, in reference to which a contract is made, is always admissible to explain and give application to the contract; *Noyes v. Canfield*, 27 Vt. 76; *Hart v. Hammett*, 18 id. 127; *Wait v. Fairbanks*, Brayt. (Vt.) 77; *Drake v. Gore*, 22 Ala. 409; *Myers v. Walker*, 24 Ill. 133; *Fitch v. Carpenter*, 43 Barb. (N. Y.) 40; but the custom must be general and well-established, or the party must be shown to have notice of it; *Jenny Lind Co. v. Bower*, 11 Cal. 194; *Collins v. Driscoll*, 34 Conn. 43; *Murray v. Hatch*, 6 Mass. 465; *Noyes v. Canfield*, *ante*; so as to raise a fair presumption that he contracted in reference to it; *Ruglee v. Goodloe*, 7 La. Ann. 295; *Appleman v. Fisher*, 34 Md. 540; *Chenery v. Goodrich*, 106 Mass. 566; and a custom inconsistent with the express terms of the contract cannot be shown; *Lombard v. Case*, 45 Barb. (N. Y.) 95; nor one that is inconsistent with or contrary to law, nor one that is not uniform. *Chenery v. Goodrich*, *ante*.

of it.<sup>1</sup> One of our old books lays down generally that "interlineation, without any thing appearing against it, will be presumed to be at the time of the making of the deed, and not after;"<sup>2</sup> other authorities seem disposed to extend this doctrine to erasures;<sup>3</sup> and both positions have recently been confirmed by the Court of Queen's Bench.<sup>4</sup> (a) But that an erasure or alteration in a *suspicious* place must be explained by the party seeking to enforce the instrument, has been law from the earliest times.<sup>5</sup> And this principle is fully recognized at the present day,<sup>6</sup> especially when an alteration affects the stamp required for a document.<sup>7</sup> The whole subject is, however, guarded by many restrictions and limitations.<sup>8</sup>

[ \* 320 ] In the case of \*wills, the rule seems reversed — unattested alterations and interlineations

<sup>1</sup> Mascard. de Prob. Concl. 256, 284; Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 43; Devot. Inst. Canon. lib. 3, tit. 9, § 21, 5th Ed.; Fleta, lib. 6, c. 34, s. 5; Co. Litt. 225 b; 10 Co. 92 b; Cro. Car. 399; Dicks. Law. Ev. in Scotl. 179; *Aldous v. Cornwell*, L. Rep. 3 Q. B. 573.

<sup>2</sup> *Trowel v. Castle*, 1 Keb. 21 (5), recognized Butl. Co. Litt. 225 b, note (1).

<sup>3</sup> Shep. Touch. 53, note (l), 8th Ed.

<sup>4</sup> *Doe d. Tatum v. Catomore*, 16 Q. B. 745. See, also, per Lord Cranworth, V. C., in *Simmons v. Rudall*, 1 Sim. N. S. 115, 136.

<sup>5</sup> 7 Edw. III. 57, pl. 44; and 27, pl. 13.

<sup>6</sup> *Earl of Falmouth v. Roberts*, 9 M. & W. 469.

<sup>7</sup> *Knight v. Clements*, 8 A. & E. 215.

<sup>8</sup> See Tayl. Ev. §§ 1616–1638, 4th Ed.; 1 Smith, Lead. Cas. 776 *et seq.* 5th Ed.; *Pigot's case*, 11 Co. 26 b; *Davidson v. Cooper*, 11 M. & W. 778; 13 Id. 343. The rule laid down in *Pigot's case*, viz., that the alteration of a deed by the obligee himself, *although it be in words not material*, makes the deed void, has recently been held not to be law. *Aldous v. Cornwell*, L. Rep., 3 Q. B. 573, 579.

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(a) *Van Horn v. Bell*, 11 Iowa, 465; *Hill v. Cooley*, 46 Penn. St. 256; *Smith v. United States*, 2 Wall. (U. S.) 219; *Shiels v. West*, 17 Cal. 324; *Davis v. Jenny*, 1 Metc. (Mass.) 221; *Ives v. Farmers' Bank*, 2 Allen (Mass.), 236; *DeVay v. New York*, 35 Barb. (N. Y.) 264. See *State v. Knapp*, 45 N. H. 148, as to the effect of alterations in localities where a crime has been committed, when the place is inspected by the jury.

being, in the absence of evidence, presumed to have been made after the execution of the will.<sup>1</sup> And by the 21st section of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, it is enacted that "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

*Stamps—Lost documents presumed to have been duly stamped—Unstamped documents admissible for collateral purposes, e. g., to show illegality or fraud.*

§ 230. Various acts of parliament, for the system is unknown to the common law, have imposed as a condition precedent to the admissibility in evidence of most documents, the pre-payment to the State of a sum of money, the receipt of which is indicated by a "stamp," affixed by a public officer. An exposition of the Stamp

<sup>1</sup> *Cooper v. Bockett*, 4 Moo. P. C. C. 419; *Doe d. Shallcross v. Palmer*, 16 Q. B. 747; *Greville v. Tylee*, 7 Moo. P. C. C. 320; *Simmons v. Rudall*, 1 Sim. N. S. 136. See, also, *Gann v. Gregory*, 3 De G., Mac. & G. 777. But in a recent case it was said that the court was not precluded by the absence of direct evidence from considering the nature of the interlineations, and the internal evidence furnished by the document itself. Per Sir J. P. Wilde, *In the goods of Cadge*, L. Rep., 1 P. & D. 543, 545.

Laws would be wholly unsuited to this work: but there are two things connected with the subject which ought to be borne in mind. First, A document which  
 [ \* 321 ] \* is lost,<sup>1</sup> or not produced on notice,<sup>2</sup> will be presumed to have been duly stamped, until the contrary is shown. Secondly, although unstamped documents are not admissible in evidence for the purpose of proving any fact *directly*, yet it is otherwise when they are tendered for *collateral* purposes;<sup>3</sup> as, for instance, to show illegality or fraud in a transaction of which the document forms a part.<sup>4</sup> The principal case establishing this doctrine is that of *Coppock v. Bower*,<sup>5</sup> in which several others will be found cited. Lord Abinger, C. B., there says, "The object of both the statute and common law would be defeated, if a contract, void in itself, could not be impeached, because the written evidence of it is unstamped, and therefore inadmissible. If that were so, a party entering into such agreement might avoid the consequences of its illegality, by taking care that no stamp should be affixed to it. I think, therefore, that in all cases where the question is whether the agreement is void at common law or by statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility. As in the case of a conspiracy, or an agree-

<sup>1</sup> *Pooley v. Goodwin*, 4 A. & E. 94; *Hart v. Hart*, 1 Hare, 1; *R. v. The Inhabitants of Long Buckby*, 7 East, 45.

<sup>2</sup> *Crisp v. Anderson*, 1 Stark. 35; *Olosmadeuc v. Carrel*, 18 C. B. 36. See, also, the case of *Bradlaugh v. De Rin*, L. Rep., 3 C. P. 286, as to the presumption that an instrument, on which there is a stamp when produced at the trial, was stamped in proper time.

<sup>3</sup> *Mattheson v. Ross*, 2 Ho. Lo. Cas. 286; *Evans v. Prothero*, 2 Mac. & G. 319.

<sup>4</sup> *Coppock v. Bower*, 4 M. & W. 361; *R. v. Gompertz*, 9 Q. B. 824; *Holmes v. Sixsmith*, 7 Exch. 802; *Ponsford v. Walton*, L. Rep., 3 C. P. 167.

<sup>5</sup> *Coppock v. Bower*, 4 M. & W. 361.



ment to commit a robbery, on no principle could it be contended that a contract between the parties for the commission of such an offense would be inadmissible without a stamp. I think that the Stamp Acts are made for a different purpose—they are made to prevent \*persons from availing themselves of the obligatory force of an agreement, unless that agreement is stamped. [\* 322]

*Since 17 & 18 Vict. c. 83, s. 27, not required in criminal cases—Alterations introduced by 17 & 18 Vict. c. 125, in civil cases.*

§ 231. Several important alterations in the law and practice relative to stamps were made by the statutes passed in the 17 & 18 Vict. By c. 83, sect. 27, “Every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, though it may not have the stamp required by law impressed thereon or affixed thereto.”

And the 17 & 18 Vict. c. 125 (the Common Law Procedure Act, 1854) contains the following provisions, which, however, only apply to civil cases, sect. 103.

Sect. 28. “Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court whose duty it is to read such document, to call the attention of the judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid.”

Sect. 29. “Such officer of the court shall, upon pay-

ment to him of the whole or (as the case may be) of the deficiency of the stamp duty payable upon or in respect of such document, and of the penalty required by statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds; \* \* \* and the Commissioners" of the Inland Revenue "shall, upon request, and production of the receipt hereinbefore mentioned, cause such documents to be stamped with the proper stamp or stamps in respect of the sums [ \* 323 ] \*so paid as aforesaid: Provided always, that the aforesaid enactment shall not extend to any document, which cannot now be stamped after the execution thereof on payment of the duty and a penalty."

Sect. 31. "No new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp."

## \* CHAPTER II.

[ \* 324 ]

## PROOF OF HANDWRITING.

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*Proof of handwriting — Proof of handwriting by resemblance to that of supposed writer, &c. — A species of circumstantial real evidence — Not secondary to direct evidence — Autograph or holograph — Onomastic and symbolic signatures.*

§ 232. In this chapter it is proposed to consider a species of proof necessarily much resorted to in judicial

proceedings; but which presents many difficulties, and has in every age been found a source of embarrassment [ \* 325 ] \*to legislators, jurists, and practitioners — the proof of handwriting.<sup>1</sup> We speak not of cases where the fact of the scription of a document is proved by eye-witnesses, or by the admissions of parties, or is inferred from circumstances; but where a judgment or opinion that a given document is or is not in the handwriting of a given person, is based on its resemblance to or dissimilarity from that of the supposed writer, an acquaintance with which has been formed by means extraneous to that document. This is a species of circumstantial real evidence,<sup>2</sup> and, like other species of circumstantial evidence, is not secondary to direct. Thus, evidence of the nature in question is perfectly receivable, although the writer of the supposed document is not examined to say whether he wrote it,<sup>3</sup> and this even if he were actually present in court; although the not calling him would of course be matter of strong observation to the jury. A document wholly in the handwriting of a

<sup>1</sup> Much of this chapter has been taken from an article, by the author, in the Monthly Law Magazine, vol. 7, p. 120. The rules of the Roman law respecting handwriting are contained in Novel. LXXIII., which, we are told in the beginning of it, was framed in consequence of the practice of counterfeiting handwriting, and the difficulties of a case which had arisen in Armenia. For the practice of the civilians, the reader is referred to Cujacius in 73 Nov.; Huberus, Præl. Jur. Civ. lib. 22, tit. 4, nn. 16 and 20; Voet. ad Pand. lib. 22, tit. 4, n. 11; Mascard. de Prob. Concl. 285, 330, 331; and Oughton, Ordo Judicior. tit. 225. The framers of the Codes Napoléon seem to have been fully sensible of the difficulties attendant on this subject, and, while admitting proof of handwriting by comparison, have taken great pains to insure the genuineness of the specimens used for the purpose. Code de Procédure Civile, Part 1, liv. 2, tit. 10, art. 193-213. *De la vérification des écritures.*

<sup>2</sup> 2 Benth. Jud. Ev. 460.

<sup>3</sup> *R. v. Hughes*, 2 East, P. C. 1002; *R. v. McGuire*, Id.; *The Bank Prosecutions*, R. & R. C. C. 378.

party is said to be an autograph or holograph;¹ where it is in the handwriting of another person and only signed by the party, the signature may be called \**“onomastic;”* where by a cross or other symbol, [ \* 326 ] *“symbolic.”*²

*Different forms of proof of handwriting by resemblance, &c.*

§ 233. Abstractedly considered, it is clear that a judgment respecting the genuineness of handwriting, based on its resemblance to or dissimilarity from that of the supposed writer, may be formed by one or more of the following means:—1st, A standard of the general nature of the handwriting of the person may be formed in the mind, by having on former occasions observed the characters traced by him while in the act of writing, with which standard the handwriting in the disputed document may, by a mental operation, be compared. 2ndly, A person who has never seen the supposed writer of the document write, may obtain a like standard by means either of having carried on written correspondence with him, or having had other opportunities of observing writing which there was reasonable ground for presuming to be his. 3rdly, A judgment as to the genuineness of the handwriting to a document may be formed, by a comparison instituted between it and other documents known or admitted to be in the handwriting of the party. These three modes of proof—the admissibility and weight of which we propose to consider in their order—have been accurately designated respectively *“Præsumptio ex visu scriptio- nis;”* *“Præsumptio ex scriptis olim visis;”* and

¹ 2 Benth. Jud. Ev. 459, 460, 461; 16 C. B. 535-6.

² 2 Benth. Jud. Ev. 459, 460, 461.

“Præsumptio ex comparatione scriptorum,” or “ex scripto nunc viso.”<sup>1</sup> (a)

<sup>1</sup> 3 Benth. Jud. Ev. 598, 599.

(a) In this country the practice, in reference to the methods by which the handwriting of a party may be proved, is by no means uniform, but in some of the States a comparison of the writing in question, with papers shown *beyond all doubt* to be genuine, is permitted; *De Pue v. Place*, 7 Penn. St. 428; *Richardson v. Newcomb*, 21 Pick. (Mass.) 315; *Hall v. Huse*, 10 Mass. 39; *Adams v. Field*, 21 Vt. 256; *Gifford v. Ford*, 5 Vt. 532; *Baker v. Mygatt*, 14 Iowa, 131; but in Pennsylvania this method is only permitted to *attack* and not to *support* the genuineness of the writing; *Guffey v. Deeds*, 29 Penn. St. 378; and in some States where a comparison is not permitted in civil cases, it is permitted in prosecutions for forgery; *People v. Hewitt*, 2 Parker's Cr. (N. Y.) 20; *State v. Bronson*, 1 Root (Conn.), 107; and in other States after the writing is established by competent evidence, it may be corroborated by a comparison with other *genuine* writings. *Bank v. Whitehall*, 10 S. & R. (Penn.) 110; *Myers v. Toscon*, 3 N. H. 47; *Clark v. Wyatt*, 15 Ind. 271; *Haycock v. Greup*, 57 Penn. St. 438; *Boman v. Plunkett*, 2 McCord (S. C.), 519. In New York a comparison is not permitted to establish the genuineness of the writing, but is to attack it; *Randolph v. Loughlin*, 46 N. Y. 456; *Hoyt v. Stuart*, 3 Bosw. (N. Y.) 447; *DuBois v. Baker*, 40 Barb. (N. Y.) 556; so in Maryland, *Williams v. Drexel*, 14 Md. 57; Virginia, *Rowe v. Kile*, 1 Leigh, 216; Georgia, *Henderson v. Hackney*, 16 Ga. 521; but it cannot go to the jury for comparison by them; Illinois, *Jumpertz v. People*, 21 Ill. 375; Kentucky, *McAllister v. McAllister*, 7 B. Monr. (Ky.) 269; Texas, *Hanley v. Gandy*, 28 Tex. 211; Wisconsin, *Pierce v. Northey*, 14 Wis. 9; Indiana, *Shank v. Butsch*, 28 Ind. 19; New York, *Van Wyck v. McIntosh*, 14 N. Y. 439; Alabama, *Bishop v. State*, 30 Ala. 34. In North Carolina a comparison will not be permitted even though the writings are in evidence for other purposes. *Otey v. Hoy*, 3 Jones, 407.

In determining whether an alteration in a will was made by the scrivener or by some other person, a comparison is allowed. *Smith v. Fenner*, 1 Gall. (Va.) 170. In *U. S. v. Craig*, 4 Wash. (U. S.) 728, it was held that a comparison in a criminal case is not permissible. In Connecticut it is held that the genuineness of a deed cannot be proved by comparison, but the signature of the justice taking the acknowledgment may be. *Welch v. Gould*, 2 Root (Conn.), 287. If other writings known to be genuine are properly in evidence in the cause, *quere* whether they cannot be compared with the instrument in question to determine its genuineness. *Medway v. U. S.*, 6 Ct. of Cl. (U. S.) 521; *Randolph v. Loughlin*, 46 N. Y. 456.

In *Chaffee v. Taylor*, 3 Allen (Mass.), 598, in an action by the indorsee of a note against the maker, it was held that the handwriting of the maker might be proved by one who has written letters to him and received replies, upon which both have acted, and this seems to be the test of competency as to this class of evidence. The mere fact that letters have been written to and received

*Presumption "ex visu scriptiois."*

§ 234. The rule with respect to proof "ex visu scriptiois" is clear and settled; namely, that any person who has ever seen the supposed writer of a document write, so as to have thereby acquired a standard in his own mind of the general character of the handwriting of that party, is a competent witness to say whether he \*believes the handwriting of the disputed document to be genuine or not.<sup>1</sup> The having seen [ \* 327 ] the party write but once,<sup>2</sup> no matter how long ago,<sup>3</sup> or having seen him merely write his signature,<sup>4</sup> or even only his surname,<sup>5</sup> (a) is sufficient to render the evidence *ad-*

<sup>1</sup> *De la Motte's case*, 21 Ho. St. Tr. 810; *Eagleton v. Kingston*, 8 Ves. 473, 474; *Lewis v. Sapio*, 1 M. & M. 39; *Willman v. Worrall*, 8 C. & P. 380; also *Garrells v. Alexander*, 4 Esp. 37.

<sup>2</sup> *Willman v. Worrall*, 8 C. & P. 380; Phill & Am. Ev. 692. See also *Warren v. Anderson*, 8 Scott, 384.

<sup>3</sup> *R. v. Horne Tooke*, 35 Ho. St. Tr. 71, 72; *Eagleton v. Kingston*, 8 Ves. 474, per Lord Eldon.

<sup>4</sup> *Garrells v. Alexander*, 4 Esp. 37; *Willman v. Worrall*, 8 C. & P. 380.

<sup>5</sup> *Lewis v. Sapio*, 1 M. & M. 39, overruling *Powell v. Ford*, 2 Stark. 164.

from the person whose writing is sought to be proved, is not enough; something must have been *done* by the one party or the other so that the identity of the writing in the letters received can be fixed upon the person whose writing is sought to be proved. This may be done in any way that establishes this identity beyond a doubt, as by the admission of the party that he wrote the letters, or in any way that leaves it certain that he was the writer of the letters from the writing in which the witness judges.

Where witnesses have sworn to a person's handwriting — except in those States where proof by comparison is admitted — it is not competent for the party upon cross-examination of witness, to lay before them papers purporting to have been signed by him, and ask them whether they believe them to be his, for the purpose of testing their knowledge of his writing, and such papers will not be permitted to go to the jury to be used by them for purposes of comparison. *Pierce v. Northey*, 14 Wis. 9.

(a) Or has only seen the person write once. *Pepper v. Barnett*, 23 Gratt. (Va.) 405, *Comm'r's v. Hanneon*, 1 Nott. & M. (S. C.) 554; *Clark v. Freeman*, 25 Penn. St. 133; *Spitler v. Bremer*, 24 id. 333; *Magee v. Osborn*, 32 N. Y. 669.

*missible*: the weakness of it is matter of comment for the jury. Where a person who cannot write is desirous of subscribing his name to a document, another person writes it for him, which signature he identifies by affixing over or near it a mark, usually a cross. Here it is obvious the difficulty of proof is much increased. "In the symbolic mode of signature," observes Bentham,<sup>1</sup> "whatever security is afforded by the two other modes (*viz.*, against spuriousness *pro parte* as well as in *toto* by the holographic, against spuriousness in *toto* by the onomastic) is manifestly wanting: a cross (the usual mark) made by one man not being distinguishable from a cross made by another, the *real* part of evidence has no place. Recognition, *viz.*, by deportment, is the only way in which this mode of authentication can be said to operate." This is rather too broadly stated. Unless there is something to identify the mark as being that of a particular person, the evidence seems not admissible; but otherwise it is impossible to distinguish this in principle from any other form of proof *ex visu scriptionis*. In one case,<sup>2</sup> (*a*) in order to prove the indorsement of a bill of exchange by one A. M., which was [ \* 328 ] \*indorsed by mark, a witness was called who stated that he had frequently seen A. M. make her mark and so sign instruments, and he pointed out some peculiarity. Tindal, C. J., after some hesitation, admitted the evidence as sufficient, and the plaintiff had a verdict. In a court of equity also, where it was sought

<sup>1</sup> 2 Benth. Jud. Ev. 461.

<sup>2</sup> *George v. Surrey*, 1 M. & M. 516. See per Parke, B., in *Sayer v. Glossop*, 12 Jur. 465.

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(*a*) The mark of a party may be proved by any person who is sufficiently acquainted with it to swear that he believes it to be his. *Strong v. Buver*, 17 Ala. 706.



to prove a debt due by a deceased person to one W. P., and to prevent the debt from being barred by the Statute of Limitations, receipts for interest were produced in the handwriting of the deceased, and signed with the christian and surname of W. P., having a cross between them; and an affidavit was produced that P. was a marksman, and that the signs or marks on those documents were respectively the mark or sign of W. P., used by him in place of signing his name; Shadwell, V. C., thought the proof of the signature sufficient.<sup>1</sup> (a)

<sup>1</sup> *Pearcy v. Dicker*, 13 Jur. 997. See also *Baker v. Dening*, 8 A. & E. 94; *In the goods of Bryce*, 2 Curt. 325.

(a) In *Pope v. Askew*, 1 Ired. (N. C.) 16, it was held that the only correct means of determining the genuineness of handwriting is by those who have seen the party write, or those who have become familiar with the person's writing by correspondence. It is not necessary that the witness should have seen the person write if he satisfies the court that he possesses the means of judging. *State v. Spence*, 2 Harr. (Del.) 348. Thus, in *Allen v. State*, 3 Humph. (Tenn.) 367, the witness testified that he had been in the habit of receiving and paying out the notes of a certain bank, and he believed he had thereby become acquainted with the handwriting and signatures of the president and cashier. The court held him a competent witness. *U. S. v. Keen*, 1 McLean (U. S.), 429; *State v. Candler*, 3 Hawks (N. C.), 393. In *Page v. Homans*, 2 Shep. (Me.) 478, it was held that a witness who had acquired a knowledge of the handwriting of the party whose signature is in question, from having seen him write, from having carried on a correspondence with him, or from a knowledge acquired from a frequent inspection of his writing is sufficient. In *Cunningham v. Hudson River Bank*, 21 Wend. (N. Y.) 557, it was held that a person, in order to be a competent witness to handwriting by reason of letters received by him, is not competent unless such acts have been recognized by the writer. The clerk of a court who has often seen the signature of a magistrate is a competent witness to prove it. *Amherst Bank v. Root*, 2 Metc. (Mass.) 522. In *Murphy v. Hagerman, Wright* (Penn.), 293, it was held that a person skilled in handwriting may give evidence of his opinion of the genuineness of a signature in a prosecution for forgery, and in *Moody v. Rowell*, 7 Pick. (Mass.) 490, it was held that the evidence of a writing-master was competent for that purpose. When a witness in his deposition states that he *knows* that the writing in question is genuine, it is enough, even though he does not state his means of knowledge. *Whittier v. Gould*, 8 Watts (Penn.), 485; so where a witness testified that he was acquainted

*Presumption "ex scriptis olim visis."*

§ 235. The practice with reference to the presumption "ex scriptis olim visis" is thus clearly stated by Patteson, J., in the case of *Doe d. Mudd v. Suckermore*:<sup>1</sup> "That knowledge" (scil. of handwriting) "may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterward communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, \*or acquiescence by the party in [ \* 329 ] some matter to which they relate, or by the witness transacting with the party some business to which

<sup>1</sup> 5 A. & E. 703, 730. See also *Lord Ferrers v. Shirley*, Fitzg. 195; *Cary v. Pitt*, Peake's Ev. App. xxxiv.; *Tharpe v. Gisburne*, 2 C. & P. 21; *R. v. Slaney*, 5 C. & P. 213; *Harrington v. Fry*, R. & M. 90; *Lager's case*, 16 Ho. St. Tr. 205; *Gould v. Jones*, 1 W. Blackst. 384; *Middleton v. Sandford*, 4 Camp. 34; *Parkins v. Hawkshaw*, 2 Stark. 239; *Greenshields v. Crawford*, 9 M. & W. 314; *Batchelor v. Honeywood*, 2 Esp. 714; *Murieta v. Wolfhagen*, 2 Car. & K. 744.

with the person's handwriting, without stating its extent or character. *Pradiere v. Comb*, 3 Brev. (S. C.) 481. In *Robertson v. Miller*, 1 McMullan (S. C.), 120, it was held that where the evidence is conflicting, a comparison may be resorted to, and that such genuine papers may be sent to the jury to be compared by them with the writing in question. But a witness will not be allowed to testify from a comparison of handwriting in court. *Wilson v. Kirkland*, 5 Hill (N. Y.), 182. In *Burnham v. Ayer*, 36 N. H. 182, it was held that a person might be used as a witness to prove the handwriting of a person where he had derived a knowledge of his handwriting from seeing him write, or from an intimate acquaintance with his signature; but that, before he can be permitted to testify, some such knowledge on his part must be shown. In *Bishop v. State*, 30 Ala. 34, the court refused to permit a genuine signature of the maker of a forged instrument to be given in evidence for the purpose of comparison. In *Magee v. Osborn*, 32 N. Y. 669, it was held that if a witness swears that he has seen the person, whose handwriting is in question, write, and that he believes the writing in question to be his, this is competent proof to go to the jury on the question of genuineness. See also *Dubois v. Baker*, 30 N. Y. 355.

they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party, evidence of the identity of the party being of course added aliundè, if the witness be not personally acquainted with him." The number of papers, however, which the witness may have seen in the handwriting of the party is perfectly immaterial, so far as relates to the *admissibility* of the evidence.<sup>1</sup> Nor is it absolutely necessary for this purpose that any act should be done or business transacted by the witness in consequence of the correspondence.<sup>2</sup> "The clerk," says Lord Denman, in *Doe d. Mudd v. Suckermore*,<sup>3</sup> "who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me." <sup>4</sup>

*Knowledge must not have been acquired with a view to the specific occasion.*

§ 236. It seems, however, that, in order to render admissible either of the above modes of proof of handwriting, the knowledge must not have been acquired or communicated with a view to the specific occasion on which

<sup>1</sup> Phil. & Am. Ev. 693.

<sup>2</sup> Id. ; 2 Stark, Ev. 514, n. (m), 3rd Ed.

<sup>3</sup> 5 A. & E. 703, 740.

<sup>4</sup> See the judgments of Patteson and Coleridge, JJ., in *Doe d. Mudd v. Suckermore*, 5 A. & Ell. 703.

the proof is offered. (a) In a case where the question turned on the genuineness of the handwriting on a bill of exchange purporting to have been accepted \*by [ \* 330 ] the defendant, the evidence of a witness who stated that he had seen the defendant write his name several times before the trial, he having written it for the purpose of showing to the witness his true manner of writing it, that the witness might be able to distinguish it from the pretended acceptance to the bill, was rejected by Lord Kenyon, as the defendant might through design have written differently from his common mode of writing his name.<sup>1</sup> So where, on an indictment for sending a threatening letter, the only witness called to prove that the letter was in the handwriting of the accused, was a policeman, who, after the letter had been received, and suspicions aroused, was sent by his inspector to the accused to pay him some money and procure a receipt, in order thus to obtain a knowledge of his handwriting by seeing him write; his evidence was rejected by Maule, J., on the ground that "Knowledge obtained for such a specific purpose and under such a bias is not such as to make a man admissible as a *quasi expert* witness."<sup>2</sup>

*Refreshing memory of witnesses.*

§ 237. It has been made a question whether a witness who, either *ex visu* scriptionis or *ex scriptis olim visis*, has acquired a knowledge of the handwriting of a party,

<sup>1</sup> *Stanger v. Searle*, 1 Esp. 14.

<sup>2</sup> *R. v. Crouch*, 4 Cox, Cr. Cas. 163.

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(a) But see *Reid v. State*, 20 Ga. 681, where in a prosecution for forgery the prosecutor procured the prisoner to write in his presence with a view of becoming acquainted with his signature and writing, and it was held that the knowledge thus obtained was admissible in evidence. See, also, *Chandler v. Barron*, 45 Me. 534.

but which, from length of time, has partly faded from his memory, may be allowed, during examination, to refresh his memory by reference to papers or memoranda proved to be in the handwriting of the party. In one case a witness was allowed to do so by Dallas, C. J., at *Nisi Prius*;<sup>1</sup> but the correctness of that decision was denied by Patteson, J., in *Doe d. Mudd v. Suckermore*;<sup>2</sup> and the propriety of the practice may fairly be questioned.

*Presumption "ex comparatione scriptorum"—General rule of the common law—not receivable as evidence—Reasons assigned for rejecting it—Examination of them.*

\*§ 238. We now proceed to the third part of this subject, namely, whether and under what [ \* 331 ] circumstances it is competent to prove the handwriting of a party to a document, by a comparison or collation instituted between it and other documents proved or assumed to be in his handwriting. By the general rule of the common law such evidence was not receivable<sup>3</sup>—for which three reasons are assigned in our books. First, that the writings offered for the purpose of comparison with the document in question might be spurious; and, consequently, that, before any comparison between them and it could be instituted, a collateral issue must be tried, to determine their genuineness. Nor is this all—if it were competent to prove the genuineness of the main

<sup>1</sup> *Burr v. Harper*, Holt, N. P. C. 420.

<sup>2</sup> 5 A. & E. 703, 737.

<sup>3</sup> *Doe d. Mudd v. Suckermore*, 5 A. & E. 703; *Stanger v. Searle*, 1 Esp. 14; *Greaves v. Hunter*, 2 C. & P. 477; *Macferson v. Thoytes*, 1 Peake, 20; *Brookbard v. Woodley*, Id. n. (a); *R. v. Cator*, 4 Esp. 117; *De la Motte's case*, 21 Ho. St. Tr. 810; *Francia's case*, 15 Ho. St. Tr. 923.

document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones, and so the inquiry might go on *ad infinitum*, to the great distraction of the attention of the jury, and delay in the administration of justice.<sup>1</sup> 2ndly, that the specimens might not be fairly selected.<sup>2</sup> 3rdly, that the persons composing the jury might be unable to read, and, consequently, unable to institute such a comparison.<sup>3</sup> As to the last of these objections, it does not seem satisfactory logic to prohibit a jury which can read from availing themselves of that means for the investigation of truth, [ \* 332 ] because other juries might, from want \*of education, be disqualified from so doing;—if some men are blind, that is no reason why all others should have their eyes put out. Nor is the second objection very formidable—it is not always easy to obtain unfair specimens, and should such be produced, it would be competent to the opposite party to encounter them with true ones. But there certainly was great weight in the first objection, particularly when taken in connection with the general rules of common law practice. So long as parties to a suit were allowed to mask their evidence till the very moment of trial, so long would it have been highly dangerous to permit either of them to adduce *ad libitum*, for the purpose of comparison, a number of supposed specimens of handwriting, which the opposite party, having had no previous notice of the intention to

<sup>1</sup> Per Coleridge, J., in *Doe d. Mudd v. Suckermore*, 5 A. & E. 706, 707; 2 Stark. Ev. 516, 3rd Ed.; *R. v. Sleight*, Surrey Sum. Ass. 1851, per Alderson, B., MS.

<sup>2</sup> *Id.*; and per Dallas, C. J., in *Burr v. Harper*, Holt, N. P. C. 420.

<sup>3</sup> Per Lord Kenyon, C. J., in *Macferson v. Thoytes*, 1 Peake, 20; per Dallas, C. J., in *Burr v. Harper*, Holt, N. P. C. 420; per Yates, J., in *Brookbard v. Woodley*, 1 Peake, 20 n. (a); per Lord Eldon, C., in *Eagleton v. Kingston*, 8 Ves. 475.

adduce, would not be in a condition either to answer or contradict—specimens which might not be fairly selected, or even be the handwriting of the party to whom they are attributed. Still the exclusion of the proof of handwriting by comparison was not satisfactory<sup>1</sup>—and if any practical means could be devised to secure at least the *genuineness* of the specimens, it ought on every principle to be received: and the legislature in modern times has accordingly taken the matter in hand, as will be shown presently.<sup>2</sup>(a)

*Exceptions—Documents which are evidence in the cause, &c.*

§ 239. There are several common-law exceptions to the rule excluding proof of handwriting by comparison: the first of which is, that it is competent for the court and jury to compare the handwriting of a disputed

<sup>1</sup> 2 Ev. Poth. 185; 2 Stark. Ev. 516, 3rd Ed.; Phill. & Am. Ev. 698.

<sup>2</sup> See 17 & 18 Vict. c. 125, ss. 27 and 103, and 28 Vict. c. 18, ss. 8 and 1, *infra*.

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(a) The rule in this country in reference to the species of proof by which handwriting may be established is quite conflicting, it being held in Alabama, *Bishop v. State*, 30 Ala. 34; Illinois, *Kernin v. Hill*, 37 Ill. 209; Indiana, *Shank v. Butsch*, 28 Ind. 19; Kentucky, *Hawkins v. Grimes*, 13 B. Monr. (Ky.) 258; New York, *Haskins v. Stuyvesant*, Anth. N. P. (N. Y.) 97; Texas, *Hanley v. Gandy*, 28 Tex. 211; Wisconsin, *Pierce v. Northey*, 14 Wis. 9; North Carolina, *Otey v. Hoy*, 3 Jones (N. C.), 407; Virginia, *Rowe v. Kile*, 1 Leigh (Va.), 216; that a comparison of the writing in question with other writings of the party, cannot be made to prove its genuineness or the contrary, while in New Hampshire, *Myers v. Toscon*, 3 N. H. 47; Massachusetts, *Richardson v. Newcomb*, 21 Pick. (Mass.) 315; Vermont, *Adams v. Fields*, 21 Vt. 523; Pennsylvania, *De Pue v. Place*, 7 Penn. St. 428; Iowa, *Baker v. Mygatt*, 14 Iowa, 181; South Carolina, *Bowman v. Plunkett*, 2 McCord (S. C.), 518; Maine, *Chandler v. Le Barron*, 45 Me. 534; such evidence has been held competent after the genuineness of the writings has been established; and in New York, *People v. Hewitt*, 2 Parker's Cr. (N. Y.) 20; Connecticut, *Satte v. Bronson*, 2 Root (Conn.), 307; such evidence has been held competent in a prosecution for forgery; also in the United States court, *Smith v. Fenner*, 1 Gall. (U. S.) 170.

document, with any others which are in evidence in the cause, and which are admitted or proved to be in the handwriting of the supposed writer.<sup>1</sup> The ground of [ \* 333 ] \*this exception is sometimes said to be that the documents being already before the jury to prevent their mentally instituting such comparison would be impossible;<sup>2</sup> but another and better reason is that this sort of proof is not open to the dangers to which the comparison of hands is exposed—namely, the raising collateral issues, and the jury being misled by spurious specimens.(a)

### *Ancient documents.*

§ 240. Another exception is the case of ancient documents. When a document is of such a date that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write, or by having held correspondence with him, the law, acting on the maxim, “*Lex non cogit impossibilia*,”<sup>3</sup> allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one.<sup>4</sup> It is

<sup>1</sup> *Griffith v. Williams*, 1 C. & J. 47; *Doe d. Perry v. Newton*, 5 A. & E. 514; *Solita v. Yarrow*, 1 M. & Rob. 133; *R. v. Morgan*, Id. 134, n.; *Allport v. Meek*, 4 C. & P. 267; *Bromage v. Rice*, 7 C. & P. 548; *R. v. Sleigh*, Surrey Sum. Ass. 1851, per Alderson, B., MS.

<sup>2</sup> *Doe d. Perry v. Newton*, 5 A. & E. 514.

<sup>3</sup> Hob. 96.

<sup>4</sup> Phill. & Am. Ev. 701; 2 Stark. Ev. 516, 517, 3rd Ed; B. N. P. 236; *Roe d. Brune v. Rawlings*, 7 East, 282, n. (a); *Doe d. Tylman v. Tarver*, R. & M. 141;

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(a) It is held in several States that a comparison of handwriting may be made with documents properly in evidence in the cause, when such evidence would not be otherwise admissible; *Dubois v. Baker*, 40 Barb. (N. Y.) 556; *Ellis v. People*, 21 How. Pr. (N. Y.) 356; *Williams v. Drexel*, 14 Md. 56; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Henderson v. Hackney*, 16 Ga. 521; but, *contra*, see *Outlaw v. Hurdle*, 1 Jones (N. C.), 150; *Otey v. Hoy*, 3 id. 407.



not easy to determine the precise degree of antiquity which is sufficient to let in evidence of this nature. In *Roe d. Brune v. Rawlings*,<sup>1</sup> the supposed writer had been dead about sixty years; in *Doe d. Tilman v. Tarver*,<sup>2</sup> the writing was nearly one hundred years old; and in *Doe d. Jenkins v. Davies*,<sup>3</sup> it was eighty-four years old. And how this comparison is to be made is not clearly settled. In Buller's *Nisi Prius* <sup>4</sup> a case is referred to, decided by Lord Hardwicke in Dec. 1746, where a parson's book \*was produced to prove a modus; the par- [ \* 334 ] son having been long dead, a witness who had examined the parish books, in which was the same parson's name, was permitted to swear to the similitude of the handwriting, &c. In the case of *Sparrow v. Farrant*,<sup>5</sup> Holroyd, J., is reported to have said that, in order to make ancient signatures available for this purpose, a witness should be produced who is able to swear, from his having examined several of such signatures, that he has acquired a sufficient knowledge of the handwriting to be able, without an actual comparison, to state his belief on the subject. Subsequent to this, however, came the case of *Doe d. Tilman v. Tarver*,<sup>6</sup> which was an action of ejectment, tried in 1824, where, in order to prove that a place called Yard Farm was part of a certain manor, a paper was put in evidence which had been handed over to the present steward, amongst other papers and books relating to the manor, by the representatives of the late

*Doe d. Mudd v. Suckermore*, 5 A. & E. 703; *Doe d. Jenkins v. Davies*, 10 Q. B. 314.

<sup>1</sup> 7 East, 282, note (a).

<sup>2</sup> R. & M. 141.

<sup>3</sup> 10 Q. B. 314.

<sup>4</sup> B. N. P. 236.

<sup>5</sup> 2 Stark. Ev. 517, n. (e), 3rd Ed.; Devon Sp. Ass. 1819.

<sup>6</sup> R. & M. 141.

steward, entitled "An account of E. H." (who appeared by the books and rolls belonging to the manor to have been steward), "receiver of the Isle of Wight estates of the Lady F. for two years ending at Michaelmas, 1727," which contained an entry relative to Yard Farm. In order to prove the handwriting of E. H., "Lord Chief Justice Abbott," says the report, "directed the person producing the paper, to compare it with the handwriting of E. H. in other papers belonging to the manor, and to say upon oath whether he believed the writings were by the same person," adding that this course had once been adopted by Lawrence, J. The observation of Lord Denman on this and some other cases, in *Doe d. Mudd v. Suckermore*,<sup>1</sup> that it does not distinctly appear from the reports whether the comparison was made with a standard formed in the mind of the witness by an inspection \*of the papers produced, or whether a

[ \* 335 ] direct comparison was made in the first instance, seems well founded; and no objection as to the mode of putting the question appears to have been raised by the counsel on either side. It is probable also that the witness examined in the case before Lawrence, J., was a scientific witness, or expert,—the report speaks of him as being accidentally in court at the time.

§ 241. In this state of the authorities the case of the *Fitzwalter peerage*<sup>2</sup> came before the committee of privileges of the House of Lords; and we shall state this case somewhat at length, it being one of the most important on the subject of handwriting in general, as well as bearing strongly on the point under consideration. It was a claim to a peerage which had fallen into abeyance

<sup>1</sup> 5 A. & E. 703, 748.

<sup>2</sup> 10 Cl. & F. 193.

in 1756, and the petition was heard in May, 1843. The claimant, in order to prove his case, proposed to put in evidence some family pedigrees, which were produced from the proper custody. They purported to have been made by E. F., who died in 1751. He had stood in the direct line of the claimant's ancestors; so that if those pedigrees could be proved to be of the handwriting of E. F., they would be admissible in evidence for the claimant, as declarations made by a deceased relative, of circumstances respecting the state of his family and immediate relatives. It was proposed to prove the handwriting of E. F., by producing from the Prerogative Office his will, already received in evidence for other purposes, and four other documents, which were proved to be of his handwriting; namely, a confidential letter written by him to the steward of his manor; another letter by him, appointing a gamekeeper within that manor; a memorandum in an account book; and a deed of settlement of property comprised within that manor. These were produced \* from a closet which contained the claimant's family muniments, including the title [ \* 336 ] deeds of the manor and property, which then belonged to him in right of his grandmother. It was proved that the deed of settlement had been repeatedly, and very recently, acted upon, and that all the documents had the genuine signature of "E. F." It was next proposed to prove the identity of the signer of those documents with the writer of the pedigrees, by comparison of the handwriting of the latter with the signatures to the proved documents; and for this purpose the inspector of franks in the General Post Office, who had had much experience in distinguishing the characters of handwriting, was called. "Being asked," says the report, "if he had exam-

ined the signatures of E. F. to three of the documents, the deed, the will, and the appointment of gamekeeper, all of which were produced to him, he said he had examined the signature to the will in the Prerogative Office twice, and looked four or five times at the signatures to the letter and other documents of E. F., and to the handwriting of the entries in the account book, and of queries on the pedigree of the family at the office of the claimant's solicitor; and he considered that, by the inspections he had made, he was so familiar with the handwriting of the person by whom these documents were written or signed, that, without any immediate comparison with them, he should be able to say whether any other document produced was or was not in the handwriting of the same person. He believed all these documents to have been signed by the same person; and he did not form his opinion merely from the signatures, but more from the general similarity of the letters, which he said were written in a remarkable character." This evidence was objected to by the Attorney-General, on the ground that the witness's knowledge of the handwriting was acquired, not in the ordinary course of business, but from having studied the handwriting for the purpose of

[ \* 337 ] \*speaking to the identity of the writer. In support of the evidence several cases were cited by the claimant's counsel, and among others *Doe d. Tilman v. Tarver* and *Sparrow v. Farrant*; to which it was replied that the Court of Queen's Bench had become more strict in its practice since those cases, most of which were cases at nisi prius or on the circuits. The pedigree was rejected by the committee as evidence, and Lord Brougham added, that about five years before, the Lord Chief Justice of the Queen's Bench had consulted him on

that kind of evidence, and their joint impression was, that if *Doe d. Tilman v. Tarver* and *Sparrow v. Farrant* were correctly reported, they had gone farther than the rule was ever carried. "In the present case," he added, "the Lord Chancellor (Lyndhurst) and himself were clearly of opinion, that they ought not to allow a person to say from inspection of the signatures to two or three documents — two only, the deed and will, being genuine instruments, admitted to be in the handwriting of E. F., — from the inspection of those two documents, that he could prove the handwriting of the party. No doubt such evidence had been often received, because it was not objected to. A witness was properly allowed to speak to a person's handwriting, from inspection of a number of documents with which he had grown familiar from frequent use of them; and it was on that ground that a person's solicitor and steward were admitted to prove his handwriting." The claimant's counsel having then referred to *Goodtitle d. Revett v. Braham*,<sup>1</sup> in which an inspector of franks at the Post Office was admitted to say as a matter of skill and judgment, whether the name signed to a will was genuine or in a feigned hand, Lord Brougham continued, "Yes, truly; for that is matter of professional \*skill. But that is no reason for admitting a witness to speak to the real handwriting of a [ \* 338 ] person, from only having seen a few of his signatures to other instruments produced to him, and that for the purpose of proving its identity." A person was then called who said he had been the family solicitor of the claimant for more than thirty years, and prior to that had been clerk to his uncle, who was the family solicitor for forty years; and, in answer to questions put to him, said that

<sup>1</sup> 4 T. R. 497.

he had acquired a knowledge of the character of the handwriting of E. F., from his acquaintance with a great number of title deeds, account books, and other instruments, purporting to have been written or signed by him, which he had occasion to examine from time to time in the course of business for his client, who then held the F. estates. This witness was admitted to prove the handwriting of the pedigree; and he said he believed, and felt no doubt whatever, that the whole of it was in the handwriting of E. F., with the exception of a few words near the bottom, which he pointed out.

§ 242. Since the case of the *Fitzwalter peerage*, the case of *Doe d. Jenkins v. Davies*<sup>1</sup> was decided by the Court of Queen's Bench. At the trial of the cause in 1845, the parish clerk of a parish at Bristol produced the register of that parish for 1761, which contained an entry of a marriage exactly corresponding with a certificate produced, dated 1761, both purporting to be signed by "W. D.," curate. The witness stated that he had been clerk for seven years and a half, and during that time had acquired a knowledge of the handwriting of W. D. from various signatures in the register; and that he believed the signatures to the entry in question in the register, and to the certificate, to be in the handwriting of W. D. This evidence was received [ \* 339 ] \*by Coltman, J., as proof of the curate's handwriting, and his ruling was affirmed by the court.

*Proof of handwriting to modern documents by knowledge acquired from specimens.*

§ 243. Considerable difference of opinion, however, prevailed on the question whether it was allowable to prove the handwriting in *modern* documents, by the tes-

<sup>1</sup> 10 Q. B. 314.

timony of witnesses whose judgment as to the character of the handwriting had been formed from specimens admitted to be genuine, and shown to them with a view of enabling them to form such opinion. In *Stanger v. Searle*,<sup>1</sup> where the question turned on the genuineness of the handwriting on a bill of exchange purporting to have been accepted by the defendant, Lord Kenyon refused to allow a witness, an inspector of franks, to compare the disputed handwriting with that on other bills accepted by the defendant, and proved to be in his handwriting; though, in the subsequent case of *Allesbrook v. Roach*,<sup>2</sup> the same judge allowed the jury to compare a suspected signature with others admitted to be authentic. In a more recent case of *Clermont v. Tullidge*,<sup>3</sup> a witness for the plaintiff stated that he was in the habit of writing letters for the plaintiff, and he admitted that one put into his hand was written by him by the direction of the plaintiff, and signed by her. The defendant's counsel then put another letter into his hand, which he said was not written by him, and that he did not believe it was written or signed by the plaintiff. Another witness having been called for the plaintiff, Lord Tenterden held that the defendant's counsel could not show him both letters, and ask whether in his belief they were not both in the same handwriting.

But the whole subject afterward underwent a complete investigation in the case of *Doe d. Mudd v. Suckermore*,<sup>4</sup> which is the leading case on the rules of evidence respecting handwriting. In that case the question turned \*on the due execution of a will, and the three attesting witnesses were called. It was sup- [ \* 340 ]

<sup>1</sup> 1 Esp. 14.

<sup>2</sup> 1 Esp. 351.

<sup>3</sup> 4 Car. & P. 1.

<sup>4</sup> 5 A. & E. 703.

posed that one of them, S., was deceived in swearing to his own attestation, and that, although he had attested a will for the testator, the document produced was not that will, but a forgery, and that the attestation was in truth a counterfeit. Upon his cross-examination, two signatures purporting to be his, and to have been subscribed to depositions made by him in proceedings relating to the same will in another court, but not produced on the present occasion, and also sixteen or eighteen signatures, apparently his, were shown to him, and he said he believed they were all in his handwriting. The cause having been adjourned, on a subsequent day another witness was called by the other side — an inspector at the Bank, professing to have knowledge and skill in handwriting, who deposed that he had during the progress of the trial made an examination of the signatures admitted by S., and by that means, and that means only, acquired a knowledge of the character of his handwriting to enable him to speak to the genuineness of the attestation on the supposed will. This evidence was objected to as being proof of handwriting by comparison, and as such rejected by Vaughan, J.; and the judges of the Court of Queen's Bench, after hearing the question fully argued on a rule for a new trial, differed in opinion. Lord Denman, C. J., and Williams, J., thought the evidence receivable, and argued as follows:—Admitting the existence of the rule excluding proof of handwriting by comparison—concerning the abstract propriety of which much doubt might exist—the present case did not fall strictly within it; and a rule so objectionable in itself ought not to be extended by construction or inference. No difference in principle existed between the present case



and those of *Smith v. Sainsbury*,<sup>1</sup> *Earl Ferrers v. Shirley*, and others,<sup>2</sup> where witnesses were allowed to form their opinion of handwriting [ \* 341 ] from correspondence or having casually seen the handwriting of the party. The witness here appeared, not in the light of an ordinary person called on to place the doubtful papers in juxtaposition, and so compare them, but of a scientific individual, called on to give to the jury the benefit of his skill; in which case *Burr v. Harper*,<sup>3</sup> and the numerous cases relative to the proof of ancient documents, showed that the recency of the period when his knowledge of the handwriting was acquired could make no difference. But even supposing this evidence were to be considered equivalent to a comparison of handwriting, still the reasons for objecting to it as such would not apply in the present case; for the documents having been admitted by the first witness to be of his handwriting, no collateral issue could be raised upon them; which distinguished the case from that of *Stanger v. Searle*,<sup>4</sup> and brought it within that of *Allesbrook v. Roach*.<sup>5</sup> Patteson and Coleridge, JJ., on the other hand, thought the evidence rightly rejected. It differed from the knowledge of handwriting obtained by correspondence, &c., in this essential point, namely, the undesignedness of the manner in which, in the latter cases, the knowledge is obtained. In such cases the letters from which the opinion of the witness is formed are letters written in the course of business, &c., without reference to their serving as evidence for a collateral purpose in future proceedings. It was admitted, in argument at the

<sup>1</sup> 5 C. & P. 196.

<sup>4</sup> 1 Esp. 14.

<sup>2</sup> Fitzg. 195.

<sup>5</sup> Id. 351.

<sup>3</sup> Holt, N. P. C. 420.

bar, to have been the uniform practice for many years to reject such evidence as this; and rightly so, for it was in substance proof of handwriting by comparison; and with respect to the fact of the first witness having admitted the genuineness of the specimens, it would be dangerous [ \* 342 ] to allow parties \*to the suit to be bound by admissions of that nature. As to *Allesbrook v. Roach*,<sup>1</sup> it must be considered as overruled by *Doe d. Perry v. Newton*;<sup>2</sup> and with respect to *Burr v. Harper*,<sup>3</sup> the legality of that decision was at least questionable, but it was never brought under review, the verdict having been against the party in whose favor it was given. They considered *Stanger v. Searle*<sup>4</sup> and *Clermont v. Tullidge*<sup>5</sup> as authorities in point. The court being thus equally divided in opinion, the rule for a new trial was of course discharged. The decision in the *Fitzwalter peerage case*, already referred to,<sup>6</sup> seems to support the view of the two judges who, in *Doe d. Mudd v. Suckermore*, were for rejecting this kind of evidence. (a)

*Testing evidence of witnesses by irrelevant documents.*

§ 244. It was also made a question, whether, when a witness had deposed to his belief respecting the genuineness or otherwise of handwriting, it was competent to test his knowledge and credit by showing him other documents, not admissible as evidence in the cause, nor

<sup>1</sup> 1 Esp. 351.

<sup>4</sup> 1 Esp. 14.

<sup>2</sup> 5 A. & E. 514.

<sup>5</sup> 4 C. & P. 1.

<sup>3</sup> Holt, N. P. C. 420.

<sup>6</sup> See *ante*, § 241.

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(a) *Baker v. Mygatt*, 14 Iowa, 181; *Chandler v. Le Barron*, 45 Me. 534; *De Pue v. La Place*, 7 Penn. St. 428; *State v. Ward*, 39 Vt. 225; *Carley v. Platt*, 2 McCord (S. C.), 260.

proved to be genuine, and asking him whether they were in the same handwriting as the disputed one.<sup>1</sup>

*Alterations introduced by statutes 17 & 18 Vict. c. 125, and 28 Vict. c. 18.*

§ 245. The difficulties attending the admission of proof of handwriting by comparison on the one hand, and its exclusion on the other, have been already noticed.<sup>2</sup> The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, introduced as a remedy the following middle course in civil cases. Sect. 27 enacts, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, \*shall be permitted to be made by witnesses; and such writings, and the [ \* 343 ] evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." By sect. 103, this enactment applies to every court of civil jurisdiction. The 28 Vict. c. 18, ss. 1, 8, extends this provision to criminal cases.

*Scientific evidence that writing is in a feigned hand, &c.*

§ 246. In order to *disprove* handwriting, evidence has frequently been adduced of persons who have made it their study, and who, though unacquainted with that of the supposed writer, undertake, from their general knowledge of the subject, to say whether a given piece of handwriting is in a feigned hand or not. Much difference of opinion has prevailed relative to the admissibility of this sort of evidence. It was received by Lord Kenyon and

<sup>1</sup> See *Hughes v. Rogers*, 8 M. & W. 123; *Griffiths v. Ivery*, 11 A. & E. 322; *Young v. Honner*, 2 Moo. & R. 536.

<sup>2</sup> *Suprà*, § 238.

the Court of Queen's Bench, on a trial at bar, in *Goodtitle d. Revett v. Braham*,<sup>1</sup> but rejected by the same judge in *Cary v. Pitt*,<sup>2</sup> on the ground that, although he had in the former case received the evidence, he had laid no stress upon it in his address to the jury. Similar evidence was, however, afterward admitted by Hotham, B., in *R. v. Cator*; <sup>3</sup> and it has also been received in the ecclesiastical courts.<sup>4</sup> The principal case on the subject, however, is that of *Gurney v. Langlands*,<sup>5</sup> which was an issue directed to try the genuineness of the handwriting to a warrant of attorney, where an inspector of franks was called as a witness, and asked, "From your knowledge of handwriting, do you believe the handwriting in question to be a genuine signature, or an imitation?" This was rejected by Wood, B.; and, on a motion for a new trial, Chief Justice Abbott [ \* 344 ] said, "I have long been of \*opinion, that evidence of this description, whether in strictness of law receivable or not, ought, if received, to have no great weight given to it. \* \* \* The other evidence in this case was of so cogent a description, as to have produced a verdict satisfactory to the judge who tried the cause; and I can pronounce my judgment much more to my own satisfaction upon a verdict so found, than if this evidence had been admitted, and had produced a contrary verdict. For I think it much too loose to be the foundation of a judicial decision, either by judges or juries." And Holroyd, J., said, "I have great doubt whether this is legal evidence; but I am perfectly clear that it is, if received, entitled to no weight." Bayley and Best, JJ.,

<sup>1</sup> 4 T. R. 497.

<sup>2</sup> Peake's Ev. App. xxxiv.

<sup>3</sup> 4 Esp. 117.

<sup>4</sup> *Saph v. Atkinson*, 1 Add. Eccl. R. 216; *Baumont v. Perkins*, 1 Phillim. 78.

<sup>5</sup> 5 B. & A. 330.

concurring, the rule was refused. A somewhat similar notion seems to have found its way to Doctors' Commons, where Sir J. Nicholl is reported to have declined the offer of a glass of high power, used by professional witnesses of this kind, to examine the handwriting and see if the letters were what is commonly termed *painted*; adding that, in his opinion, the fact of their being painted was in itself an extremely trivial circumstance.<sup>1</sup> This is carrying matters a great way, and farther than is usual in courts of common law, which never reject the artificial aid of glasses or lamps, where they can be of assistance in the investigation of truth. That scientific evidence of the nature in question may, in the language of C. J. Abbott, "be much too loose to be the foundation of a judicial decision," may be perfectly true; but to declare it *inadmissible* as an adminiculum of testimony is rather a strong position. Indeed, its admissibility seems to be recognized in the more recent cases of the *Fitzwalter peerage*,<sup>2</sup> the *Tracy peerage*<sup>3</sup> and *Newton v. \*Rick-etts*; <sup>4</sup>(a) and, according to the present practice, [ \* 345 ] it is generally received without objection. The *Tracy peerage* case also shows, that the evidence of persons whose occupation makes them conversant with MSS. of different ages, is receivable to prove that a given piece of handwriting is of a particular date.

<sup>1</sup> *Robson v. Roocke*, 2 Add. E. R. 88, 89. See, also, *Constable v. Steibel*, 1 Hagg. N. R. 61, 62; and *In the goods of Oppenheim*, 17 Jur. 306.

<sup>2</sup> 10 Cl. & F. 198.

<sup>3</sup> Id. 154.

<sup>4</sup> 9 H. L. Ca. 262.

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(a) *Baker v. Mygatt*, 14 Iowa, 131.

*Infirmative circumstances affecting all proof of handwriting by resemblance.*

§ 247. Whatever may be the relative values of the several modes of proving handwriting which have been discussed in this chapter, when compared with each other, it is certain that all such proof is even in its best form precarious, and often extremely dangerous. “On a forgotten matter we can hardly make distinction of our hands.”<sup>1</sup> “Many persons,” it has been well remarked, “write alike, having the same teacher, writing in the same office, being of the same family, all these produce similitude in handwriting, which in common cases, and by common observers, is not liable to be distinguished. The handwriting of the same person varies at different periods of life: it is affected by age, by infirmity, by habit.”<sup>2</sup>

[ \* 346 ] The two following instances \*show the deceptive nature of this kind of evidence. The first is related by Lord Eldon, in the case of *Eagleton v.*

<sup>1</sup> Huberus, Præl. Jur. Civ. lib. 22, tit. 4, n. 16; Wills. Circ. Ev. 111, 3rd Ed.; and see the judgment of Sir J. Nicholl in *Robson v. Rocke*, 2 Add. Eccl. Rep. 79.

<sup>2</sup> Twelfth Night, Act 2, Scene 3.

<sup>3</sup> Per Adam, arguendo, in *R. v. Mr. Justice Johnson*, 29 Ho. St. Tr. 475. See, also, per Sir J. Nicholl in *Constable v. Steibel*, 1 Hagg. N. R. 61. “Literarum dissimilitudinem sæpe quidem tempus facit, non enim ita quis scribit juvenis et robustus, ac senex et forte tremens, sæpe autem et languor hoc facit: et quidem hoc dicimus, quando calami et atramenti immutatio, similitudinis per omnia aufert puritatem.” Nov. LXXIII. Præf. See the able article “Autography,” in Chambers’ *Edinb. Journal* for July 26, 1845, where it is said, “Men of business acquire a mechanical style of writing, which obliterates *all natural characteristics*, unless instances where the character is so strongly individual as not to be modified into the general mass. In the present day, all *females* seem to be taught after one model. In a great proportion the handwriting is moulded on this particular model, &c. We often find that the style of handwriting is *hereditary*, &c., &c.”

*Kingston*.<sup>1</sup> A deed was produced at a trial, purporting to be attested by two witnesses, one of whom was Lord Eldon. The genuineness of the document was strongly attacked; but the solicitor for the party setting it up, who was a most respectable man, had every confidence in the attesting witnesses, and had in particular compared the signature of Lord Eldon to the document, with that of pleadings signed by him. Lord Eldon, however, had never attested a deed in his life. The other case occurred in Scotland, where, on a trial for the forgery of some bank notes, one of the banker's clerks, whose name was on a forged note, swore distinctly that it was his handwriting, while he spoke hesitatingly with regard to his genuine subscription.<sup>2</sup> Standing alone, any of the modes of proof of handwriting by resemblance are worth little—in a criminal case nothing—their real value being as adminicula of testimony. But still if the defendant does not produce evidence to disprove that which is adduced on behalf of the plaintiff, this raises an additional presumption in favor of the latter. Slight evidence, uncontradicted, may become cogent proof.

*Ancient practice respecting the proof of handwriting by resemblance.*

§ 248. Our ancient lawyers appear to have used the expression, "comparison, or similitude of handwriting," in its more proper and enlarged sense; as designating any species of presumptive proof of handwriting by resemblance—either comparison with a standard previously created in the mind *ex visu scriptiois* or *ex*

<sup>1</sup> 8 Ves. 476.

<sup>2</sup> *Case of Carsewell*, Glasgow, 1791; cited Burnett's Crim. Law of Scotland 502; Wills, Circ. Ev. 112, 3rd Ed.

scriptis olim visis, or direct comparison in the modern sense of the word —and to have considered that any of those modes of proof was admissible in civil, and none [ \* 347 ] \*of them in criminal cases.' This latter distinction was, however, abandoned in modern times until its partial revival by the Common Law Procedure Act, 1854;<sup>2</sup> but since the 28 Vict. c. 18, ss. 1 and 8, may be looked on as completely at an end.

<sup>1</sup> See the note to *Doe d. Mudd v. Suckermore*, 5 A. & E. 702, 752; and it seems to have been on this principle that the attainder of Algernon Sidney, in 1683, was reversed by statute. His trial and the statute will be found in 9 Ho. St. Tr. 817, 996.

<sup>2</sup> 17 & 18 Vict. c. 125, s. 27; *supra*, § 245.



RULES REGULATING THE ADMISSIBILITY AND  
EFFECT OF EVIDENCE.

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*Primary and secondary rules of evidence.*

§ 249. The rules regulating the admissibility and effect of evidence are of two kinds — PRIMARY and SECONDARY: the former relating to the *quid probandum*, or thing to be proved; the latter to the *modus probandi*, or mode of proving it. They will be considered in two separate Parts.

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## PART I.

## THE PRIMARY RULES OF EVIDENCE.

§ 250. THE PRIMARY rules of evidence may all be ranged under three heads, in which we accordingly propose to examine them.

1. To what subjects evidence should be directed.
2. The burden of proof, or *onus probandi*.
3. How much must be proved.

These rules, as stated in a former part of this work, have their basis in universally recognized principles of natural reason and justice; but owe the shape in which they are actually found, and the extent to which they prevail, to the artificial reason and policy of law.

<sup>1</sup> Bk. 1, pt. 2, § 111.

[ \* 349 ]

## \* CHAPTER I.

## TO WHAT SUBJECTS EVIDENCE SHOULD BE DIRECTED.

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*Evidence should be directed and confined to the matters which are in dispute, or form the subject of investigation.*

\*§ 251. Of all rules of evidence, the most universal and the most obvious is this—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or form the subject of investigation. The theoretical propriety of this rule never can be matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters which either are in dispute between contending parties, or otherwise require proof; and any thing which is neither directly nor indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. “*Frustrà probatur quod probatum non relevat.*”<sup>1</sup> “Evidence to the jury,” says Finch,<sup>2</sup> “is any thing whatsoever which serves the party to prove the issue for him; but that which does not warrant the issue, is void; as in a formedon, and the gift traversed, the demandant shall not give in evidence another donor.” So on the trial of an indictment for stealing the property of A., and also for receiving it knowing it to have been stolen; evidence of possession by the prisoner, of other property stolen from other per-

<sup>1</sup> Broom’s Maxims, xxix. 4th Ed.; Halk. Max. 50. “La liberté d’alléguer et de prouver des faits, ne s’étend pas à toutes sortes de faits indistinctement; mais le juge ne doit recevoir la preuve que de ceux qu’on appelle pertinens; c’est-à-dire dont on peut tirer des conséquences qui servent à établir le droit de celui qui allégue ces faits: et il doit au contraire rejeter ceux dont la preuve, quand ils seroient véritables, seroit inutile.” Domat, Lois Civiles, &c. Part 1, liv. 3, tit. 6, sect. 1, section 10.

<sup>2</sup> Finch, Comm. Laws, 61 b.

sons at other times, was not admissible at common law to prove either the stealing or the receiving.<sup>1</sup>

*Twofold grounds of irrelevancy of evidence—Matters unnecessary to be proved.*

\* § 252. Evidence may be rejected as irrelevant for one of two reasons. 1st. That the connection between the principal and evidentiary facts is too remote and conjectural. 2nd. That it is excluded by the state of the pleadings, or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered. The use of pleadings, or analogous statements of contending parties, is to enable the tribunal to see the points in dispute, and the parties to know beforehand what they should come prepared to attack or defend: consequently, although a piece of evidence tendered might, if merely considered per se, establish a legal complaint, accusation, or defense; yet, as the opposite party has had no intimation beforehand that that ground of complaint, &c., would be insisted on, the adducing evidence of it against him would be taking him by surprise and at a disadvantage. Hence the maxim of pleading, “Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium.”<sup>2</sup> The discussion of the admissibility of evidence under the various forms of pleading in particular actions, &c., would be wholly inconsistent with the design of this work, and we will therefore confine

<sup>1</sup> *R. v. Oddy*, 2 Den. C. C. 264. But now, by the 32 & 33 Vict. c. 99, s. 11, “where proceedings are taken against any person for having in his possession stolen goods, evidence may be given, that there were found in the possession of such person, other goods stolen within the preceding period of twelve months,” for the purpose of proving the offense.

<sup>2</sup> Co. Litt. 303 a. See also 5 Co. 61 a; Jenk. Cent. 2, Cas. 64.

ourselves to the general question; before proceeding to which, however, it is important to observe that there are certain matters which it is unnecessary to prove, *i. e.*, 1. Matters noticed by the courts *ex officio*. 2. Matters deemed *notorious*. “*Lex non requirit verificare quod apparet curiæ.*”<sup>1</sup> “*Quod constat curiæ opere testium non indiget.*”<sup>2</sup>

*Matters noticed by the courts ex officio.*

§ 253. An enumeration of the matters which the courts, in obedience to common or statute law, notice *ex officio*, would here be out of place.\* Suffice it to \*say generally, that, besides noticing the ordinary course of nature, seasons, times, &c., the [ \* 352 ] courts notice without proof various political, judicial, and social matters. Thus, they notice the political constitution of our own government; the territorial extent of the jurisdiction and sovereignty exercised *de facto* by it; the existence and titles of other sovereign powers; the jurisdiction of the superior courts, and courts of general jurisdiction; the seals of the superior courts, and of many others; the custom or law of the road that horses and carriages shall respectively keep on the left side, &c., &c. In all cases of this kind, where the memory of a judge is at fault, he resorts to such documents or other means of reference as may be at hand, and he may deem worthy of confidence.\* Thus, if the point

<sup>1</sup> 9 Co 54 b.

<sup>2</sup> 2 Inst. 662.

\* A large number will be found collected in Tayl. Evid. part 1, ch. 2, 5th Ed., and 1 Phill. Ev. ch. 10, sect. 1, 10th Ed.

<sup>1</sup> 1 Greenl. Ev. § 6, 7th Ed.; Tayl. Ev. § 20, 3rd Ed.

at issue be a date, the judge will refer to an almanac.<sup>1</sup> The *printed* calendar was used for this purpose at least as early as the 9 Hen. VII.<sup>2</sup>

•  
*Matters deemed notorious.*

§ 254. The law of England is very slow in recognizing matters as too notorious to require proof,<sup>3</sup> and it is not easy to lay down a definite rule respecting them. In *Richard Baxter's* case, in 1685,<sup>4</sup> the defendant was charged with having published a seditious libel; and Jefferies, C. J., is reported to have told the jury,—“It is *notoriously* known there has been a design to ruin the king and nation; the old game has been renewed, and this” (the defendant) “has been the main incendiary.” The iniquity of such a direction as this, supposing it correctly reported, needs no comment. The language of Wilde, C. J., in the case of *Ernest Jones*,<sup>5</sup> who was indicted for making a seditious [ \* 353 ] \*speech at a public meeting, seems to throw some light on this subject. The Lord Chief Justice there told the jury, that they should take into consideration what they knew of the state of the country and of society generally, at the time when the language was used. What might be innoxious at one time, when there was a general feeling of contentment, might be very dangerous at another time when a different feeling prevailed. But that they could not, without proof of them, take into their consideration particular facts attending the particular meeting at which the words were

<sup>1</sup> Id., and see *Sutton v. Darke*, 5 H. & N. 647, 649.

<sup>2</sup> Hil. 9 H. VII., 14 B. pl. 1.

<sup>3</sup> See Introd. pt. 2, § 38.

<sup>4</sup> 11 Ho. St. Tr. 501.

<sup>5</sup> Centr. Cr. Court, 1841, MS.

spoken. And this seems confirmed by a case of *R. v. Dowling* decided the same year.<sup>1</sup>

*Evidence rejected for remoteness — Only applicable to presumptive evidence — Instances.*

§ 255. The rejection of evidence on the ground of remoteness, or want of reasonable connection between the principal and evidentiary facts, has been shown in another place to be a branch of that fundamental principle of our law, which requires the best evidence to be adduced.<sup>2</sup> The rule has obviously no application where the evidence tendered is either *direct*, or, though circumstantial, is *necessarily* conclusive upon the issue. But whether a given piece of *presumptive* evidence is receivable, or ought to be rejected on this ground, is not unfrequently a question of considerable difficulty. Some instances illustrative of this have already been given,<sup>3</sup> to which may be added the following. On a question between landlord and tenant as to the terms on which the premises were held, although it might assist to know the terms on which the landlord usually let to his other tenants, not connected with the tenant whose case is under consideration, the evidence would \*be rejected as too remote.<sup>4</sup> [ \* 354 ] So in an action for goods sold and delivered, to which the defense was that the sale was subject to a certain condition, it was held not competent to the defendant to call witnesses, to prove that the plaintiff had made contracts with other persons subject to that condi-

<sup>1</sup> MS., cited Arch. Cr. Pl. 147, 15th Ed., Centr. Cr. Court. See, further, *Moody v. The London and Brighton Railw. Co.*, 1 B. & S. 290, 293; *Parker v. Green*, 2 Id. 299; *Holcombe v. Hepson*, 2 Camp. 391.

<sup>2</sup> Bk. 1, pt. 1, §§ 88, 90 *et seq.*

<sup>3</sup> Id., § 92.

<sup>4</sup> *Carter v. Pryke*, 1 Peake, 95. See *Spenceley v. De Willott*, 7 East, 110.

tion.<sup>1</sup> But acts unconnected with the act in question are frequently receivable to prove psychological facts, such as *intent*.<sup>2</sup> Thus, on an indictment for uttering a forged bank note, evidence is admissible that the accused has uttered similar forged notes, &c.<sup>3</sup>

*Evidence to character.*

§ 256. One of the strongest instances of the beneficial application of the principle in question, is to be found in the rules respecting the admissibility of evidence to character. That the general reputation and previous conduct of a litigant party or witness is often of immense weight as natural or moral evidence, as tending to raise a presumption that his action or defense is well or ill founded, or that the evidence which he gives is true or false, must be obvious. But, on the other hand, the exposing every man who comes into our courts of justice to have every action of his life publicly scrutinized, would keep most men out of them.<sup>4</sup> To admit character evidence in every case, or to reject it in every case, would be equally fatal to justice; and to draw the line—to define with precision where it ought to be received, and where it ought to be rejected—is as embarrassing a problem as any legislator can be called upon to solve.<sup>5</sup>

<sup>1</sup> *Hollingham v. Head*, 4 C. B., N. S. 388.

<sup>2</sup> *R. v. Weeks*, 1 Leigh & C. 18.

*Infra*, pt. 2, ch. 1.

<sup>4</sup> *Fost. Cr. Law*, 246.

<sup>5</sup> Even Bentham, 3 *Jud. Ev.* 193, admits the difficulties of this subject, and says that some of them seem scarce capable of receiving solution but in the Gordian style.



*Evidence to the character of parties—General rule—  
not receivable.*

\*§ 257. With respect to the character of [<sup>\* 355</sup>] *parties* to a cause, the law of England meets the difficulty by taking a distinction between cases where their character ought to be supposed in issue, and where it ought not. According to the general rule, upon the whole probably a just one, it is not competent to give evidence of the general character of the parties to forensic proceedings, much less of particular facts not in issue in the cause, with the view of raising a presumption either favorable to one party or disadvantageous to his antagonist.<sup>1</sup> This principle has been carried so far that, on a prosecution for an infamous offense, evidence of an admission by the accused that he was addicted to the commission of similar offenses, was rejected as irrelevant.<sup>2</sup>

*Exception—When the character of a party is in issue  
by the proceedings.*

§ 258. But where the very nature of the proceedings is to put in issue the character of any of the parties to them, a different rule necessarily prevails; and it is not only competent to give general evidence of the character of the party with reference to the issue raised, but even to inquire into particular facts tending to establish it. Thus, on an indictment for keeping a *common* bawdy-house, or *common* gaming-house,<sup>4</sup> or for being a *com-*

<sup>1</sup> Phill. & Am. Ev. 488-91; 1 Phill. Ev. 502-508, 10th Ed. † *King v. Francis*, 3 Esp. 117, per Lord Kenyon.

<sup>2</sup> *R. v. Cole*, Mich. 1810, by all the judges; Phill. & Am. Ev. 499; 1 Phill. Ev. 508, 10th Ed.

<sup>3</sup> Bull. N. P. 295.

<sup>4</sup> *Clark v. Periam*, 2 Atk. 339.

*mon* barrator,<sup>1</sup> the prosecutor may give in evidence any acts of the defendant which support the general charge. So, where the issue is whether a party is non compos mentis, proof may be adduced of particular [ \* 356 ] 'acts of insanity.'<sup>2</sup> In actions for seduction,<sup>3</sup> and criminal conversation,<sup>4</sup> while that species of action existed,<sup>5</sup> the character of the female for chastity is directly in issue, and may be impeached either by general evidence of misconduct, or proof of particular acts of it. So, a charge of rape,<sup>6</sup> or of assault with intent to commit rape,<sup>7</sup> brings the question of the chastity of the female so far in issue, that it is competent to the accused to give general evidence of her previous bad character in this respect; or even to show that she has been criminally connected with himself.<sup>8</sup> But the authorities are not agreed as to whether, and under what circumstances, he will be allowed to prove particular acts of unchastity committed by her with other men.<sup>9</sup>

<sup>1</sup> 2 Stark. Ev. 304, 3rd Ed. In cases of barratry, however, notice must be given to the defendant, of the particular acts of barratry intended to be relied on at the trial; *Id.*; B. N. P. 296; *Goddard v. Smith*, 6 Mod. 261, 262; *R. v. Rowton*, 1 Leigh & C. 520, 542, per Willes, J.

<sup>2</sup> *Clark v. Periam*, 2 Atk. 340.

<sup>3</sup> Phill. & Am. Ev. 488, 489; 1 Phill. Ev. 503, 10th Ed.; *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Camp. 519; *Verry v. Watkins*, 7 C. & P. 308.

<sup>4</sup> B. N. P. 296; 1 Selw. N. P. 26, 9th Ed.; *Elsam v. Faucett*, 2 Esp. 562, per Lord Kenyon, C. J.; *R. v. Barker*, 3 C. & P. 589, per Park, J.

<sup>5</sup> See bk. 2, pt. 1, ch. 2, § 182.

<sup>6</sup> Phill. & Am. Ev. 489; 1 Phill. Ev. 505, 10th Ed.; *R. v. Martin*, 6 C. & P. 562; *R. v. Barker*, 3 C. & P. 589.

<sup>7</sup> Phill. & Am. Ev. 489; 1 Phill. Ev. 505, 10th Ed.; *R. v. Clarke*, 2 Stark. 244.

<sup>8</sup> *R. v. Martin*, 6 C. & P. 562; *R. v. Aspinall*, 3 Stark. Ev. 952, 3rd Ed.

<sup>9</sup> See Tayl. Evid. §§ 336 and 1296, 4th Ed.

*Evidence to the character of the accused in criminal prosecutions.*

§ 259. Although, in criminal prosecutions in general, the character of the accused is not in the first instance put in issue, still, in all cases where the direct object of the proceedings is to punish the offense; such as indictments for treason, felony, or misdemeanor;<sup>1</sup>—and is not merely the recovery of a penalty,<sup>2</sup>—it is competent to him to defend himself by proof of previous \*good character, reference being had to the nature of the charge against him. “On a [ \* 357 ] charge of stealing,” says a well-known treatise on the Law of Evidence,<sup>3</sup> “it would be irrelevant and absurd to inquire into the prisoner’s loyalty or humanity; on a charge of high treason it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question.”

*Nature of character evidence liable to be misunderstood.*

§ 260. Few subjects are more liable to be misunderstood than character evidence. On an indictment for stealing from A., for instance, proof that on other occa

<sup>1</sup> 2 Stark. Ev. 304, 3rd Ed.; Phill. & Am. Ev. 490; 1 Phill. Ev. 506, 10th Ed.

<sup>2</sup> Phill. & Am. Ev. 488; 1 Phill. Ev. 502, 10th Ed. See, also, *Att.-Gen. v. Radloff*, 10 Exch. 84.

<sup>3</sup> Phill. & Am. Ev. 490, 491, 1 Phill. Ev. 506, 10th Ed.

sions, wholly unconnected with the transaction in question, the accused acted the part of an honest, or even liberal and high-minded man, in certain transactions with B. and C. — even assuming that it would to a certain extent render improbable the supposition of his having acted with felonious dishonesty toward A. — is too remote and insignificant to be receivable in evidence: the inquiry should be as to his *general* character among those who have known him, with a view of showing that his *general* reputation for honesty is such as to render unlikely the conduct imputed to him. And even the individual opinion of a witness, founded on his own personal experience of the disposition of the accused, is inadmissible.<sup>1</sup> “It frequently occurs, indeed,” says the author last quoted, “that witnesses, after speaking to the general opinion of [ \* 358 ] the prisoner’s \*character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favor to the prisoner than strictly as evidence of general character.”<sup>2</sup>

*May be contradicted — But not encountered by proof of particular acts — Exceptions.*

§ 261. Whenever it is allowable to impeach the character of a party, it is competent to the other side to give evidence to contradict the evidence adduced.<sup>3</sup> And although, in a criminal prosecution, evidence cannot in the first instance be given to show that the accused has borne a bad character, still, if he sets up his character as an

<sup>1</sup> *R. v. Rowton*, 34 L. J., M. C. 57; 1 Leigh & C. 520; by eleven judges against two.

<sup>2</sup> Phill. & Am. Ev. 491; 1 Phill. Ev. 506, 10th Ed.

<sup>3</sup> *R. v. Murphy*, 19 Ho. St. Tr. 724; B. N. P. 296; *R. v. Clarke*, 2 Stark. 241; *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Camp. 519.

answer to the charge against him, he puts it in issue, and the prosecutor may encounter his evidence either by cross-examination or contrary testimony.<sup>1</sup> In *R. v. Wood*,<sup>2</sup> the prisoner, who was indicted for a highway robbery, called a witness, who deposed to having known him for years, during which time he had, as the witness said, borne a good character. On cross-examination it was proposed to ask the witness whether he had not heard that the prisoner was *suspected* of having committed a robbery which had taken place in the neighborhood some years before. This was objected to as raising a collateral issue; but Parke, B., overruled the objection, saying, "The question is not whether the prisoner was *guilty* of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." The question was accordingly put, and the prisoner convicted.

\*But, as it is not competent for the accused to show particular acts of good conduct, the [ \* 359 ] prosecutor cannot go into particular cases of misconduct. Exceptions to this rule have been introduced by statute. The 6 & 7 Will. 4, c. 111, enacts, that if upon the trial of any person for any subsequent *felony not punishable with death* he shall give evidence of his good character, it shall be lawful in answer thereto to give evidence of his conviction for a previous *felony*. The subsequent act, 14 & 15 Vict. c. 19, s. 9, provided, that if, upon the trial of any person for a subsequent offense, such person

<sup>1</sup> *R. v. Rowton*, 34 L. J., M. C. 57; 1 Leigh & C. 520, overruling *R. v. Burt*, 5 Cox, Cr. Cas. 284. See, also, 2 Stark. Ev. 304, 3rd Ed.; Bull. N. P. 296; 2 Russ. Cr. 786, 3rd Ed.

<sup>2</sup> Kent Sp. As. 1841; MS., and 5 Jurist, 225.

should give evidence of his good character, it should be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for a previous offense or offenses. This statute was repealed by 24 & 25 Vict. c. 95; and its provisions have been re-enacted by 24 & 25 Vict. c. 96, s. 116, as to larceny and similar offenses, and by 24 & 25 Vict. c. 99, s. 37, as to offenses against the coin; but the 24 & 25 Vict. c. 97, relating to malicious injuries to property, c. 98, relating to forgery, and c. 100, relating to offenses against the person, contain no similar provision. It was equally within the 14 & 15 Vict. c. 19, s. 9, whether the evidence to character was given by witnesses called on the part of the accused, or extracted by cross-examination from witnesses for the prosecution.<sup>1</sup> In practice we seldom see evidence adduced, to rebut evidence as to character, although it is apprehended that the interests of justice would be advanced if it were done more frequently.

*Witnesses to the character of parties treated with great indulgence.*

§ 262. •Witnesses to the characters of parties are in general treated with great indulgence—perhaps too much. Thus, it is not the practice of the bar to cross-examine such witnesses unless there is some specific [ \* 360 ] \*charge on which to found a cross-examination,<sup>2</sup> or at least without giving notice of an intention to cross-examine them if they are put in the box; the judges discourage the exercise of the undoubted right of prosecuting counsel to reply on their testimony;<sup>3</sup> and

<sup>1</sup> *R. v. Shrimpton*, 2 Den. C. C. 319; 3 Car. & K. 373.

<sup>2</sup> *R. v. Hodgkiss*, 7 C. & P. 298.

<sup>3</sup> *R. v. Stannard*, 7 C. & P. 673. That the right exists, see that case, and the Resolutions of the judges, 7 C. & P. 676, Res. 4, and *R. v. Whiting*, 7 C. & P. 771.

the most obvious perjury in giving false characters for honesty, &c., is every day either overlooked or dismissed with a slight reprimand. But surely this is mercy out of place. If mendacity in this shape is not to be discouraged, tribunals will naturally be induced either to look on all character evidence with suspicion, or to attach little weight to it. Now there are many cases in which the most innocent man has no answer to oppose to a criminal charge but his reputation; and to deprive this of any portion of the weight legitimately due to it, is to rob the honest and upright citizen of the rightful reward of his good conduct. In this, as in many other instances, the old legal maxim holds good, "*Minatur innocentes qui parcit nocentibus.*"<sup>1</sup> It has accordingly happened that judges, knowing from experience how little weight is due to the character evidence so often received, have occasionally told juries that character evidence is not to be taken into consideration unless a doubt exists on the other evidence—a position perfectly true in the sense that, if, on the facts, the jury believe the accused guilty, to acquit him out of regard for his good character would be a violation of their oath; but utterly false and illegal, if its meaning be, that character evidence is not to be considered until the guilt or innocence of the accused is first determined on the facts. The use of character evidence is to assist the jury in estimating the value of the evidence brought against \* the accused; and we cannot dismiss this subject without directing attention to the shrewd [ \* 361 ] observations of C. J. Holt:<sup>2</sup> "A man is not born a knave; there must be time to make him so, nor is he presently

<sup>1</sup> 4 Co. 45 a. See also Jenk. Cent. 3, Cas. 54.

<sup>2</sup> *R. v. Swensden*, 14 Ho. St. Tr. 596.

discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next."

*Evidence to the character of witnesses.*

§ 263. With respect to the character of *witnesses*. The *credibility* of a witness is always in issue; and accordingly general evidence is receivable, to show that the character which he bears is such that he is unworthy to be believed, even when upon his oath.<sup>1</sup> But evidence of particular facts, or particular transactions, cannot be received for this purpose; both for the reasons already assigned,<sup>2</sup> and also because it would raise a collateral issue, *i. e.*, an issue foreign to that which the tribunal is sitting to try.<sup>3</sup> The witness may indeed be *questioned* as to such facts or transactions, but he is not always bound to *answer*; and if he does, the party questioning must take his answer and cannot call evidence to contradict it.<sup>4</sup> (a) A change in

<sup>1</sup> *Reg. v. Brown*, L. Rep. 1 C. C. 70.

<sup>2</sup> §§ 256, 260, 261.

<sup>3</sup> 13 Ho. St. Tr. 211; 16 Id. 246-7; 32 Id. 490-5; B. N. P. 296; Stark. Ev. 237-8, 4th Ed.; *R. v. Burke*, 8 Cox, Cr. Cas. 44.

<sup>4</sup> *Suprà*, bk. 2, pt. 1, ch. 1.

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(a) The character of a witness may be discredited by showing that he entertains hostile feelings toward the other party, but the hostility must be shown by some act or words of the witness; the mere fact that a state of things exists between them *likely* to create hostility is not admissible; *State v. Bilausky*, 3 Minn. 246; *State v. Oscar*, 7 Jones (N. C.), 305; *McHugh v. State*, 31 Ala. 317; *Rankin v. Crow*, 19 Ill. 626; *State v. Montgomery*, 28 Mo. 594; so the feeling of a witness against the cause may be given, even where there is no ill-feeling against the party. *State v. Sam*, 8 Jones (N. C.), 150.

So it is always competent to show the relationship of the witness to the party for whom he testifies, for the purpose of being weighed with his testimony and determining his bias. *Carr v. Moore*, 41 N. H. 131; *Batdorf v. Farmers' National Bank*, 61 Penn. St. 171.

So a witness' interest in a suit or the event of it, whether direct or otherwise, may be shown, as that he has an immediate interest in the verdict, is bail for the costs, or has a suit pending in his own favor, involving a similar question



the law on this subject was made as to civil cases, by the 17 & 18 Vict. c. 125, s. 25, which enacts, "A witness in any cause may be questioned as to whether he has been

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against the same party, and it is for the jury to say how far this interest affects his evidence, and whether it, to any extent, creates a bias that renders his evidence in any measure untruthful. *Gill v. Campbell*, 24 Texas, 405; *Robbins v. Butler*, 24 Ill. 387; *Floyd v. Wallace*, 31 Ga. 688; *Elwood v. Western Union Telegraph Co.*, 45 N. Y. 549.

The foundation for impeachment by contradictory statements applies to the case of depositions as well as oral evidence on the stand, and if a party allows a deposition to be taken *ex parte*, or neglects to lay the foundation therefor by the requisite cross-examination, he is precluded from contradicting the witness by statements *aliunde*; *Lightfoot v. People*, 16 Mich. 507; *Matthews v. Dare*, 20 Md. 248; *Bobo v. Bryson*, 21 Ark. 387; *Strunk v. Ochiltree*, 15 Iowa, 177; but a contrary rule prevails in Vermont; and also as to *parties* to a suit who testify in their own behalf; *Knight v. House*, 29 Md. 194; so a witness may be impeached by showing that he has sworn differently in an important respect in a former trial; *Com. v. Mead*, 12 Gray (Mass.), 167; *Molyneaux v. Collier*, 30 Ga. 731; *Chelsey v. Chelsey*, 37 N. H. 229; or that he has made different statements out of court from what he testifies to on the stand; *Wrege v. Westcott*, 1 Vroom (N. J.), 212; *Gaines v. Com.*, 50 Penn. St. 319; *Floyd v. Wallace*, 31 Ga. 688; *People v. Rables*, 29 Cal. 421; *Rice v. Cunningham*, *id.* 429; but the statement must be essentially conflicting; *Hall v. Young*, 37 N. H. 134; *Gerrish v. Pike*, 36 *id.* 510; and must be material to the issue; *State v. Thibau*, 30 Vt. 100; *State v. Staley*, 14 Minn. 105; *Gandolfo v. Appleton*, 40 N. Y. 533; *Bradford v. Barclay*, 39 Ala. 33; *Matthews v. Dare*, 20 Md. 248; *Bobo v. Bryson*, 21 Ark. 387; *Strunk v. Ochiltree*, 15 Iowa, 179; so it is competent for the purpose of impeaching a witness to show a statement made by the *party* for whom he testifies, that the witness had made a statement essentially different from that made on the stand. *Allen v. Harrison*, 30 Vt. 219.

But a witness cannot be impeached in any of these modes except on the ground of hostility, interest or relationship, unless he is first examined upon those points, for he may admit the contradictory statements and be able to satisfactorily explain them; *Rice v. Cunningham*, 29 Cal. 429; and the foundation must be laid by calling his attention to the specific facts, including time, place and names of the persons, and the occasion when the contradictory statements are claimed to have been made. *People v. Garnett*, 29 Cal. 622; *Root v. Wood*, 34 Ill. 283; *Gregory v. Cheatham*, 36 Mo. 165; *Runyan v. Price*, 15 Ohio St. 1; *Pendleton v. Empire Stone Dressing Co.*, 15 N. Y. 13; *Stephens v. People*, 19 *id.* 549; *Sard v. Horsey*, 5 Harr. (Del.) 317; *Gaffney v. People*, 50 N. Y. 423; *Walden v. Finch*, 70 Penn. St. 460.

A witness may admit that he has sworn differently, or that he has made contradictory statements in reference to the matter out of court, and yet be able to explain the matter satisfactorily to the jury as that he testified under intimi-

convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove

dation, or that he desired to accomplish some particular end; *Tilton v. Beecher*, Brooklyn, N. Y., Circuit, 1875; or in any way that satisfies the jury that the contradiction does not arise from any inherent defect in the witness' moral character, or a purpose to mislead them by false swearing. The jury in all cases are the judges of the weight to be given to evidence and of the validity of such excuses.

These species of impeachments are extremely unsatisfactory, and seldom result beneficially to parties, unless the misstatements are of a flagrant character and such as satisfy the jury that the witness is not entitled to credit. If his appearance upon the stand, added to that of the alleged contradictory statements, impresses the jury unfavorably, they may discredit his evidence; but, if upon the other hand his appearance is favorable, and he tells his story with an air of sincerity and truth, and shows no disposition to prevaricate or cover up the truth, the jury *may*, as they generally *do*, give his evidence upon the stand full and entire credit.

The maxim, *falsus in uno falsus in omnibus*, has but little application in these modern times, *Com. v. Billings*, 97 Mass. 405, except to willful misstatements under oath. It by no means follows that because a witness has made *one* false statement, all his statements are false, and jurors are left to give to the evidence so much weight as they deem it entitled to in view of what he has sworn to, its reasonableness or unreasonableness, his appearance upon the stand, the *manner* in which his evidence was given, and those thousand and one other matters which cannot be explained, that carry conviction or incredulity to the mind of one who listens to the story of another. Indeed, it is a fact well known, that a witness otherwise entitled to credit, often fails to gain credit with a jury simply because his *manner* upon the stand is such as to strike them unfavorably, and it is recognized as one of the modes by which the evidence of a witness may be discredited. *Rankin v. Crow*, 19 Ill. 626.

The maxim, *falsus in uno falsus in omnibus*, should only be applied to *willful* misstatements. *Express Co. v. Hutchins*, 58 Ill. 44; *Pope v. Dodson*, id. 366.

The rule is said to be that as against the evidence of unimpeached witnesses, unless the evidence of the witnesses impeached is corroborated, it is error for a jury to find a verdict upon the testimony of an impeached witness; but this rule has reference more to witnesses impeached by evidence of general character, or who are shown to have willfully sworn falsely to some material matter, than these special impeachments; and even then the rule is subject to an exception which leaves large latitude to the jury, and that is, that they may predicate their verdict upon the evidence of the impeached witness if the evidence of the unimpeached witness is unreasonable, unnatural, improbable, or he has an interest in the suit, or, in other words, which is the real substance of the

such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offense, purporting

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rule, if the jury do not believe it, but *do* believe the evidence of the witness who stands impeached. *Elwood v. West, Union Tel. Co.*, 45 N. Y. 549; *Warren v. Haight*, 62 Barb. (N. Y.) 490.

The rule is *invariably* that evidence of contradictory statements can never be given in impeachment of a witness unless his attention is first called to them specifically as to time, place and person involved in the supposed contradiction; and if it is claimed that there is a discrepancy between the evidence then given and his evidence on a former trial, or in a deposition or affidavit made in the cause, or in any writing, the discrepancy must first be called to the attention of the witness that he may explain it if he can. *State v. Collins*, 32 Iowa, 36; *Gibbs v. Linabury*, 22 Mich. 479; *Gaffney v. People*, 50 N. Y. 423; *Keerans v. Brown*, 68 N. C. 43; *Romertz v. East River National Bank*, 49 N. Y. 577; *Lee v. Chadsey*, 3 Abb. (N. Y. App.) 43.

The usual practice is to ask the witness the precise question, referring to the substance of the contradiction, the person to whom it was made, and the time and place when and where it was made. *Sloan v. N. Y., etc., R. R. Co.*, 45 N. Y. 125.

A witness may of course be contradicted in any portion of his evidence material to the issue, whether given in chief or on cross-examination; but a party cannot, on cross-examination, call his attention to *new* and *collateral* matter not pertinent to the issue, and then introduce evidence to contradict him in these matters with the purpose of affecting his credit. But as to any matter relevant to the issue, he may be thus impeached by contradicting him as to matter developed on cross-examination. *Rosenwig v. People*, 63 Barb. (N. Y.) 635; *Crounse v. Fitch*, 1 Abb. (N. Y. App.) 475; *State v. Elliott*, 68 N. C. 124; *Green v. Rice*, 33 N. Y. 292.

It has been held that when a witness denies having any interest in the suit it is proper to show that the statement is false, as this is a matter which goes to the credit of the witness, and could be shown even if the question had not been put to the witness. *Gearey v. People*, 22 Mich. 220.

In order to impeach a witness by showing that he has made statements inconsistent with the contents of a written document, the document itself must be produced. *Pratt v. Norton*, 2 Hun (N. Y.), 517.

There may be instances where the answer of a witness, although indicating a want of recollection or a desire to conceal the truth, is yet given in such a way as to prevent the introduction of impeaching evidence; as in answer to an inquiry whether he did not give a certain version of the matter to such a person, he answers, "I don't remember, I may have done so; very likely I did, but if I did, I was mistaken." Under such an answer no evidence can be given to show contradictory statements made out of court, for the reason that the answer, while not positively admitting the making of such a statement, is yet

to be signed by the clerk of the court, or other officer having the custody of the records of the court where  
 [ \* 362 ] \*the offender was convicted, or by the deputy of such clerk or officer, &c., shall, upon proof of

so far an admission as to exclude inculpatory proof, and while no decided case is at hand as authority, yet it is within the author's experience in *nisi prius* cases that inculpatory evidence has been rejected under such an answer.

Again, in all cases, in order to admit inculpatory evidence, the statements sought to be denied must be positive statements of facts, *and not a mere expression of an opinion*. The fact that a witness has given expression to an opinion as to the merits of an action inconsistent with his evidence, will not warrant the introduction of evidence of the expression of such opinion by way of impeachment. *Nute v. Nute*, 40 N. H. 60; *Holmes v. Anderson*, 18 Barb. (N. Y.) 420; *Elton v. Larkin*, 5 C. & P. 385.

There is a method adopted by witnesses very often of blunting the edge of impeachments by replying to questions put to them for the purpose of laying the foundation of an impeachment, that they "do not know," "cannot remember," "have no recollection of it," "to the best of my recollection I did not," "think I should remember if I had," and a multitude of other similar dodges, annoying both to the court and counsel, but against which there is no specific relief. But in all such cases, the party has a right to introduce the evidence of contradictory statements precisely the same as though the answer had been a flat denial. The rule in this respect was laid down by Parke, B., in *Crowley v. Page*, 7 C. & P. 789. In that case the controversy arose over some hay delivered to the plaintiff by the defendant, and which the plaintiff claimed was not *good* hay, which was the species of hay the contract called for. The plaintiff having put one John Beard upon the stand, who swore that the hay was not good, the defendant's counsel then showed him a paper which was signed by the witness and others, certifying to the good quality of the hay, which he admitted having signed. The defendant's counsel then asked him if he did not tell the defendant, in the presence of John Burton, that the hay was good, and he stated that he did not recollect saying so to him. The plaintiff objected to the reading of the paper, and also to the introduction of John Burton to testify as to what the witness had said to him in reference to the quality of the hay. Parke, B., said: "If the witness has said at another time that the hay was good, you may give evidence that he said so; and if it was by writing, you may read the document. Mr. Beard said, when the paper was shown to him, that the signature was his. That entitles the other side to read it. If it contradicts his evidence, he may be called back to explain it." The paper was then read in evidence, and, as to the evidence of John Burton, the court said: "He did not admit it and he did not deny it. Evidence of the statements of witnesses on other occasions *relevant to the matter at issue*, and inconsistent with the testimony given by them on the trial, is always admissible in order to

the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the

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impeach the value of that testimony; but it is only such statements as are relevant that are admissible, and in order to lay the foundation for the admission of such contradictory statements, and to enable the witness to explain them, and as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, *with the name of the person to whom, or in whose presence he is supposed to have said it, or some other circumstances sufficient to designate the particular occasion.* If the witness, on cross-examination, *admits* the conversation imputed to him, there is no necessity for giving other evidence of it, *but if he says he does not recollect*, that is not an admission, and you may prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. If it were not so, you could never contradict a witness who said he could not remember."

In *Martin v. Flanders*, 25 N. H. 195, it was held, that where a witness, in answer to a question as to whether he had an interest in the suit, answered by saying that he did not know that he had any interest in the suit, it was held, that evidence might be admitted showing that he had an interest and its extent. But this case can hardly be regarded as an authority upon the main question, because the evidence would have been admissible as affecting the credit of the witness without any such inquiry, but the court placed the case squarely upon the question of admissibility by way of impeachment. So where a witness, in answer to such inquiries, answers, "it is my impression I did not," or "I think I did not," evidence may be given to contradict the statements he has made in chief. *Hoyt v. Moulton*, 25 N. H. 195. So where a witness in reply to inquiries whether he has not made statements regarding the case contradictory of those which he has testified to (naming them), answers that he "does not remember to have told the person any such thing; thinks he never had any conversation with him on the subject," it was held that it might be proved that he *had* had such a conversation with the person named, and that it was different from that testified to by him; *Sealey v. State*, 1 Kelley (Ga.), 213; so when a witness was asked upon cross-examination if he had not made certain statements in reference to the case to certain persons, different from those given by him on the stand, he answered that he "did not recollect," it was held that such statements might be proved. *People v. Jackson*, 3 Parker's Cr. (N. Y.) 590; see, also, *Martin v. Farnham*, 25 N. H. 195; *Nute v. Nute*, 41 id. 60.

In *Gregg v. Jamison*, 55 Penn. St. 468, it was held that a witness who, in answer to an inquiry as to whether he had not made a statement to a certain person inconsistent to the one sworn to by him, said that he did not remember whether he had or not, might be impeached by showing that he had, the court remarking that, "unless a witness making such replies could be impeached by showing the contradictory statements made by him, he could always turn aside the means of impeaching him by alleging a want of memory."

same." And this provision has since been extended to criminal cases by the 28 Vict. c. 18; ss. 1 and 6.

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So in *Ray v. Bell*, 24 Ill. 444, it was held that where a witness says that he cannot recollect whether he has made certain contradictory statements, such contradictory statements may be proved. *Chapman v. Coffin*, 14 Gray (Mass.), 454. But, see *Mendenhall v. Banks*, 16 Ind. 284, where a different rule was adopted.

But where a witness gives no evidence at all upon the point to which his attention is called, by reason of his inability to remember, it is not competent to introduce evidence to show that at some former time he did remember or professed to. Again, in order to make such evidence admissible at all, it must not only be as to a matter which is vital to the issue, but the statement proposed to be shown must be so clearly different from that given by the witness as to indicate that upon the one occasion or the other the witness has repeated a falsehood. That is, the variance must be essential and vital rather than trifling and of no importance in determining the degree of credit to be given to the statements of the witness under the obligations of an oath. *Sorrelle v. Craig*, 9 Ala. 534; *McAteer v. Mullen*, 2 Barr (Penn.), 32; *State v. Reed*, 60 Me. 550.

Thus, in *State v. Reed*, *ante*, the prisoner was indicted for murder, and upon his trial was a witness in his own behalf. It appeared that on the morning after the murder his hand was found badly injured, and the explanation that he gave of the injury upon the stand was, that "he hurt it in a fall when he was getting over a pair of bars with a bunch of shingles on his shoulder that evening, and that it was an old sprain originally received in a quarrel ten or fifteen years before, and had swollen up several times."

One Vance was called as a witness for the defense but gave no evidence in chief upon the subject of the injury. On cross-examination he testified as follows: "He (the prisoner) told me what he said to Elder Ray, but I will not tell you what he said to him, because I cannot state positively what he said to him; it was quite a while ago."

"Question. Did Reed say he hurt his hand jumping over a pair of bars after a cow?"

"Answer. He was talking to Mr. Ray; he said something about getting over a pair of bars, but whether he was after a cow or not, I do not know."

"Question. Did you tell any body that he said so?"

"Answer. I do not know but that I might have told some folks so."

The State then called one Hale as a witness, who, against the objection of the prisoner, testified that he saw the witness Vance, after the murder, and that he told him that he (Vance) saw the prisoner the morning after the murder, and that he (the prisoner) told him "that he hurt it when he was after a cow, that he fell and struck it upon a log or something."

Elder Ray was a witness for the State, but did not remember that the prisoner made any such statement to him in Vance's presence, nor was there any

*Evidence not admissible in one point of view, or for one purpose, admissible in or for some other—Evidence not admissible to prove some of the matters in question, admissible to prove others—Evidence not admissible in the first instance may become so by matter subsequent—Evidence admissible to prove subalternate principal facts.*

§ 264. In determining the relevancy of evidence to the matters in dispute in a cause, it is of the utmost importance to remember that the question is whether the evi-

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evidence except that of Hale to establish any such fact. The prisoner was convicted, and upon appeal the judgment was unanimously reversed upon the ground that the evidence of Hale was improperly admitted, because it was not called for under the statement of the witness, and because the evidence was not contradictory. Barrows, J., in delivering the judgment of the court, among other things, said: "It is undoubtedly true that our rules of practice permit counsel who expect to prove an independent fact by a witness called by the opposite party to some other point, to call out that fact on cross-examination, and in case of failure, through the false or erroneous reply of the witness, *whenever the fact is material to the issue* to prove it *aliunde*, to impeach and nullify the witness' statements respecting it by showing any contradictory or conflicting statements made by him. \* \* \* But evidence of what the witness has said is admissible only to *invalidate his testimony*, and is not competent as *substantive evidence of the fact proposed to be proved*. To make such statement admissible, *the witness must have testified to something that requires to be impeached*, in order to make proof of the fact, and mere want of recollection can seldom, if ever, be of that character." The learned judge continues by comparing the evidence of Vance with that of Hale, showing that Hale's evidence is not inconsistent with or in anywise contradictory of the evidence given by Vance, and that, while the evidence probably did prejudice the prisoner's case, it was wholly irrelevant and of no value whatever, either by way of impeachment or as evidence of a substantive fact.

So in *Elton v. Larkins*, 5 C. & P. 385, a witness for the plaintiff having given material evidence in his favor, was asked by the counsel for the defendant if he had not on a certain occasion said that the "plaintiff had not a leg to stand on." He denied that he had ever made any such statement. The defendant then proposed to call a witness to prove that he had said so, but Tindal, C. J., rejected the evidence, saying: "It seems to me hardly to come within the rule relating to matter directly connected with the issue. *If there had*

dence offered is relevant *to any of them*,—as evidence not admissible in one point of view or for one purpose, may be perfectly admissible in some other point of view, or

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*been any contradiction of the broker's assertion of a matter of fact*, as to whether he had or had not made the communication, it might have been received. But this is only a contradiction of a matter of judgment, and I think it ought not to be received."

The only instance in which impeaching evidence can be received when it relates merely to a matter of judgment or opinion, *is when the evidence itself is a matter of opinion or judgment*, as when a person is testifying as an expert and his evidence is dependent on his naked judgment and opinion, as when it relates to the value of property or the character of work, or the method in which a particular thing should have been done, in such cases it is competent to show that the witness has given an opinion in conflict with the one sworn to. *Daniels v. Conrad*, 4 Leigh (Va.), 401; *Sanderson v. Nashua*, 44 N. H. 472.

A witness may be impeached by showing his general character for truth and veracity to be bad, without any notice or warning; but not as to specific vices. A man may not be prepared at all times to defend himself against them; indeed, he may have them, and yet his general character, his reputation for truth and probity, may be preserved. It is a matter of common experience, common knowledge, that men may be reckless in their habits, may be addicted to numerous vices, and yet, through them all, their reputation for truth and veracity is preserved, shining out from this moral debris, like a stray diamond from the mire. Every person is bound to know how he has preserved this element of his character, and is presumed at all times to be able to defend it; therefore, it may be attacked at any time and without notice. Impeachments of this character go to the general reputation of the witness, and are made by persons having knowledge of his general character in this respect. The presumption of the law is that if a person's general reputation is that of a truthful person, he is entitled to credit; while, if his general reputation is bad for truth and veracity, or is not on a par with that of men in general, he is not entitled to credit. This species of impeachment is open to much criticism, yet it exists as one of the legal methods of determining the value of the evidence of witnesses. In some of the States of this country, and in England, they go a step further and take the opinion of the impeaching witnesses as to whether they would believe the witness under oath. No particular number of witnesses are designated as sufficient to establish this species of impeachment, but it is, of course, necessary that there should be such a number as to establish the general bad reputation of the witness in this respect, and it must appear that the witnesses called are acquainted with the general character of the witness in this respect among his neighbors; and in those States where the question as to whether the impeaching witnesses would believe him under oath, it would seem that they must also be acquainted with the witness. At all events, it would seem that they must also be acquainted with the witness



for some other purpose. 1. Evidence not admissible to prove some of the issues or matters in question, may be admissible to prove others — evidence not admissible *in*

and that they must be possessed of such a knowledge of his general reputation in this respect, as to be able to say whether it is up to the average of mankind; *Kelly v. Proctor*, 41 N. H. 139; *Cook v. Hunt*, 24 Ill. 535; *Woodman v. Churchill*, 51 Me. 112; *Com. v. Lawler*, 12 Allen (Mass.), 585; and persons who do not reside in the town where the witness resides, but who were sent there with a view to ascertaining what his reputation was, will not be permitted to testify as to the result of his inquiries. The evidence must come from those who reside there, or from those who *know* the witness and his general reputation; *Reid v. Reid*, 2 Green (N. J.), 101; nor can opinions, formed after the litigation commenced, be used in impeachment. The reputation must be one that existed *before* the suit was brought; *Reid v. Reid*, 2 Green (N. J.), 101; witnesses cannot in such impeachments be questioned as to specific vices or acts of immorality, or matters tending to affect his credit, but must be confined exclusively to the general character of the witness as a man of truth, and his evidence must be predicated upon his knowledge of his *general* character in this respect, and not upon his own private opinion or belief. *Ayers v. Duprey*, 27 Tex. 593.

Thus, it is held not proper to ask a witness, on such an impeachment, whether the person sought to be impeached has been in State's prison; *Rathbone v. Ross*, 46 Barb. (N. Y.) 127; or as to her character for chastity, but the question should go to the general moral character; *Kilburn v. Mullen*, 23 Iowa, 498; nor whether she has not borne a bastard child. *Weathers v. Barksdale*, 30 Ga. 888. After evidence going to the general impeachment is in, the other side may call witnesses to sustain the reputation of the witness impeached. *Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.), 251.

The fact that a witness has been thus impeached does not prevent the jury from considering his evidence and giving it all the weight to which it is intrinsically entitled; *Adams v. Adams*, 2 Green (N. J.), 324; and it is error for a court to charge the jury that, if the general character of a witness is successfully impeached, they are bound to disregard his testimony. The testimony is still before the jury subject to the suspicion cast on it by the impeachment, but the jury are at liberty to give it such weight as it is intrinsically entitled to. *Sharp v. State*, 16 Ohio St. 218. Neither the credit of a witness or party can be impeached until after they have testified. *Mullin v. Cottrell*, 41 Miss. 291.

When a person's character is attacked in any of the modes, except by general impeachment, evidence of good character is not generally admissible by way of rebuttal; *Boardman v. Woodman*, 47 N. H. 12; *Vernon v. Tucker*, 30 Md. 456; *Hannah v. McKillop*, 49 Barb. (N. Y.) 342; *Pruitt v. Cox*, 21 Ind. 15; otherwise, however, in Indiana, *Harris v. State*, 30 Ind. 131; *Clark v. Bond*, 29 id. 555; and in Maine, *Prentiss v. Robbins*, 49 Me. 127; and in North Caro.

*causâ* may be most valuable as evidence *extra causam*; and evidence not receivable either in proof of the facts in dispute, or to test the credit of witnesses, &c., may be im-

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lina when the nature of the impeaching evidence is calculated to degrade the witness; *State v. Cherry*, 63 N. C. 473.

Testimony short of a general impeachment, which will warrant the introduction of evidence to sustain his general character for truth, must be such as tends to *degrade* the witness; and it was held that, where a witness was inquired of whether he had not been tried for, and acquitted of a crime in another State, did not justify the introduction of such proof, *because* there was nothing tending to degrade the witness, as the mere fact of his being tried for a crime and acquitted showed that no legal guilt of the crime attached to him. *Harrington v. Lincoln*, 4 Gray (Mass.), 563; *Frost v. McCarger*, 29 Barb. (N. Y.) 617; *Vance v. Vance*, 2 Metc. (Ky.) 581; *Chapman v. Cooley*, 12 Rich. (S. C.) 654; but otherwise in Texas, see *Burrell v. State*, 18 Tex. 713; neither does evidence that the witness has conspired with the other party to cheat and defraud the other, warrant the admission of evidence of general good character; *Heywood v. Reed*, 4 Gray (Mass.), 594; nor the fact that indictments for libel are pending against him; *Campbell v. State*, 23 Ala. 44; nor the fact that he is contradicted in material portions of his evidence; *Lenori v. Bishop*, 4 Duer (N. Y.), 420; nor that he is of intemperate habits; *Hoitt v. Moulton*, 1 Foster (N. H.), 586; nor is evidence admissible to show that the witness is regarded as a notoriously bad character, that he is esteemed a horse thief, and that he is unworthy of belief, and has recently been under arrest for a crime in another State or county; *State v. Sater*, 8 Clarke (Iowa), 420; and generally, a witness' character cannot be attacked by particular acts of immorality; *Macdonald v. Garrison*, 2 Hilt. (N. Y. C. P.) 510; *Boon v. Weatherhead*, 23 Tex. 675; *Crabtree v. Kile*, 21 Ill. 180; *Kitchingman v. State*, 6 Wis. 426; *Nugent v. State*, 18 Ala. 521; *People v. Gay*, 7 N. Y. 378; but on the trial of 'an action of slander, the court may, in its discretion, permit the plaintiff to introduce evidence of his good character, even though unassailed, except by the charge upon which the action is predicated. The reason for this is, that such evidence has an important bearing upon the question of damages. *Shroyer v. Miller*, 3 W. Va. 158. So it is always competent for the party, whose witness is claimed to have made conflicting statements out of court, to corroborate him in any matter material to the issue, but it is not competent to introduce corroboratory proof as to immaterial or irrelevant matters. *Frazer v. People*, 54 Barb. (N. Y.) 306. Thus it is not competent to show that the witness has told to others the same story as testified to by him; *State v. Vincent*, 24 Iowa, 570; *Com. v. Jenkins*, 10 Gray (Mass.), 485; *Com. v. Casey*, 2 Brewst. (Penn.) 404; *Butler v. Truslow*, 55 Barb. (N. Y.) 293; *United States v. Holmes*, 1 Cliff. (U. S. C. C.) 98; *Boyd v. Bank*, 25 Iowa, 255; *Judd v. Brentwood*, 46 N. H. 430; but see *State v. Dennin*, 32 Vt. 153, where a different rule was adopted. But in *Reed v. Spaulding*, 42 N. H. 114, which, so far as the question of the admissi-

portant as showing the amount of damage sustained by a plaintiff, &c. 2. Evidence not admissible in the first instance may become so by matter subsequent. Thus, in a

bility of the evidence was concerned, was identical with *State v. Dennin*, such evidence was held inadmissible. See, also, *People v. Schweitzer*, 23 Mich. 301, where it is held that evidence of a distinct offense, though it tends to corroborate the impeached witness, cannot be given.

In those States where the mode of impeachment is by inquiry of the witness whether he would believe the witness sought to be impeached under oath, the usual course pursued is first to inquire of the impeaching witness as to his acquaintance with him, as to what his reputation is in the neighborhood where he resides, for truth and veracity, and then, whether the witness would, from his knowledge of his general reputation, believe him under oath. *Knight v. House*, 29 Md. 194; *Boyle's Executors v. Kreitzer*, 46 Penn. St. 465.

It is not sufficient for a witness to swear that he would not believe the witness under oath. He must first swear that the general character of the witness is bad, and that from what he knows of that, he would not believe the witness on his oath; *King v. Ruckman*, 20 N. J. 316; and this must be upon his own knowledge of the witness' reputation. *Lyman v. Philadelphia*, 56 Penn. St. 488.

It is not essential to a successful impeachment that the witness should swear that he would not believe him under oath; *People v. Lester*, 35 Cal. 553; a witness who testifies from his own knowledge of the witness, and does not show that he has any knowledge as to what the witness' general reputation is, is wholly incompetent as an impeaching witness and cannot be admitted to testify. *Ayres v. Duprey*, 27 Tex. 593.

It is always competent for the party whose witness is sought to be impeached, to cross-examine the impeaching witnesses fully as to their knowledge of the general character of the witness sought to be impeached, whom they have heard call his reputation in question, what the state of feeling is between the witness and the one as to whose character he is called, and, generally, to put any inquiry that tends to test his knowledge of the witness' character, his feelings toward him, his bias, interest, relationship, or any thing that tends to show prejudice, want of information, malice or ill-feeling. *Ballard v. Lambert*, 40 Ala. 204.

In Kentucky, where impeachments are by showing general infirmity of moral character, it is held that special acts of the witness, as that he has been prosecuted for perjury or engaged in any immoral or unlawful enterprise, is not admissible, but that the evidence must be confined to the general reputation of the witness and must come from those who *know* what that general reputation is. *Taylor v. Com.*, 3 Bush (Ky.), 508.

In Kansas it is held that the impeaching evidence must be confined to the reputation of the witness for truth and veracity, and that his general character cannot be inquired into. *Taylor v. Clendenning*, 4 Kan. 524.

suit between A. and B., the acts or declarations of C. are *primâ facie* not evidence against B., and ought to be rejected; but if it be shown that C. was the lawfully con-

In criminal cases the prosecution will not be allowed to introduce evidence of the general bad character of the prisoner unless the prisoner, as he may do, introduces evidence of his former good character, in which case the prosecution may show the bad character of the respondent in rebuttal. *Griffin v. State*, 14 Ohio St. 55; *Johnson v. State*, 21 Ind. 329.

Not only may the evidence of a witness be discredited by showing that he has made contradictory statements, but also, if he has before testified in the cause, and upon the last occasion testifies to material facts that were not sworn to by him before, this fact may be shown to affect his credibility. For, it cannot be claimed that the evidence of a witness is free from suspicion, when he, upon a former occasion, has omitted to testify to material facts, which he subsequently claims to remember. It is not necessarily the case that the last evidence is false because not given before; but, unless fairly explained, it furnishes just ground for suspicion that the evidence is not wholly true; *Briggs v. Taylor*, 35 Vt. 57; *Travis v. Brown*, 43 Penn. St. 9; so where a party on a former trial, through his counsel, claimed to defend the suit upon grounds entirely inconsistent with his present testimony, this may be given in evidence to discredit his evidence; *Noy v. Merrian*, 35 Vt. 438; but in order to show what the witness testified to on a former trial, neither the minutes of counsel, or of the judge, or the report of evidence taken, though signed by the presiding judge, are competent. It must be proved by the testimony of witnesses present at the trial who were in a situation to know what *was* sworn to, and who will swear that they *do* know; *Webster v. Calden*, 55 Me. 165; but if the counsel, judge, or person taking minutes of testimony at a former trial, undertakes to swear what evidence was then given, his minutes may be used as evidence to show that his recollection is not in accordance with them. *Lanham v. Com.*, 3 Bush (Ky.), 528. Indeed, it is always competent for a party against whom a party has testified to show any thing that affects his credit, whether by conflicting statements made out of court, bias, ill feeling, relationship, interest, or any thing which tends to show that the witness is not entitled to full credit; *Batdorff v. Farmers' National Bank*, 61 Penn. St. 179; *Hutchinson v. Wheeler*, 35 Vt. 330; *O'Neill v. Lowell*, 6 Allen (Mass.), 110; *New Portland v. Kingfield*, 55 Me. 173; *Ellsworth v. Potter*, 41 Vt. 685; and if a party, in the cross-examination of his adversary's witness, calls out matter material to the issue which does not grow out of the examination-in-chief, he is not thereby concluded by the evidence, but may introduce evidence to contradict it; *Frank v. Manny*, 2 Daly (N. Y. C. P.), 92; but see *Carpenter v. Ward*, 30 N. Y. 243, as to collateral matters. In that case it is held that an adversary cannot draw out testimony as to collateral matters, and then introduce evidence to contradict him upon them, unless the collateral matters were drawn out by the adverse counsel. As to all such collateral matters drawn out by his questions,

stituted agent of B., either generally, or with respect to the special matters in question, his acts or declarations become evidence against his principal. So a litigant

he is concluded by the answers given by the witness, but as to *material* matters he is not concluded; *Chapman v. Brooks*, 31 N. Y. 75; and see *Fairchild v. Bascomb*, 35 Vt. 398, where it is held that a person is concluded by material matter called out on the cross-examination of an adversary's witness.

In laying the foundation for the impeachment of a witness by contradictory statements made out of court, the witness' attention must be called to the person, time and place with reasonable certainty, so that he can identify the occasion, but the *exact* occasion is not necessary; *Bennett v. O'Bryne*, 23 Ind. 604; neither need the question be put in the exact form put to the impeaching witness, nor embody the exact statement, but must be such as to call the witness' attention to the particular occasion and statement. *Day v. Stickney*, 14 Allen (Mass.), 255. In *Higgins v. Carlton*, 28 Md. 115, it was held that, where a witness was simply inquired of generally, whether she had not had a certain conversation with another witness, without calling her attention to the time, place or attendant circumstances, no sufficient foundation was laid for the introduction of impeaching evidence. If a party desires to contradict a witness by a deposition given by him in the case, he must lay the foundation therefor by inquiring of him in reference to such statements, otherwise he is precluded from introducing the deposition; *Bradford v. Barclay*, 37 Ala. 33; the same rule also applies to letters where the witness admits what he has written so far as they are read to him: *Bigler v. Flickinger*, 55 Penn. St. 279; nor is it competent to sustain a witness by the cumulation of evidence on an immaterial point; *Schuchardt v. Allen*, 1 Wallace (U. S.), 359; but, of course, a party may introduce any evidence *material* to the issue with that view and purpose.

Evidence of an expert may be contradicted by showing that at another time he gave a different opinion. *Sanderson v. Nashua*, 44 N. H. 492. Evidence to be admissible must show a contradiction. If it can be construed so as to sustain the statement of the witness, it will be, although the statement is different; *Hine v. Pomeroy*, 39 Vt. 211; *Hall v. Simmons*, 24 Texas, 227; and it must be of some *fact* stated, and not a mere comment upon the subject that indicates a general want of veracity. *Hall v. Young*, 37 N. H. 134.

The immoral character of a witness does not necessarily destroy his testimony, but is to be taken into account by the jury in determining the degree of weight they will give his evidence. *Jones v. State*, 13 Tex. 168. Thus in some States it is held that it may be shown that a woman is a prostitute, not by special acts, but by proof of her general character in that respect, and this fact may be weighed by the jury in determining, in view of her evidence, its reasonableness or unreasonableness, how much credit they will give her evidence. *Jones v. State*, *ante*.

In California, Massachusetts, New York, evidence of bad character is not

party may, by his mode of conducting his case, render that evidence for his adversary which otherwise would not be so. Thus, although a man's own verbal or

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admissible to discredit a witness. The inquiries must be directed to general bad character. *People v. Yslas*, 27 Cal. 630; *Com. v. Churchill*, 11 Metc. (Mass.) 536; *Shepherd v. Parker*, 36 N. Y. 517; *Ford v. Jones*, 62 Barb. (N. Y.) 484. So it has been held that it may be shown, in an action on a note given in settlement of a charge of rape, that a married woman was in the habit of hanging out signals to the defendant to come to her, as affecting her credit. *Shepherd v. Parker*, 36 N. Y. 517. So the fact that a witness has been arrested for a crime may be shown by inquiries put to him.

The rule in reference to *special* impeachments, or impeachments by showing that a witness is *bad* in a particular respect, is confined exclusively to cases where the character of the person is in question in respect to that matter; as in an action for assault and battery, slander, libel, criminal conversation, seduction, etc., etc., the character of the party who put him or herself upon the stand may be attacked in that particular respect. Thus in *Ford v. Jones*, 62 Barb. (N. Y.) 484, the plaintiff brought an action against the defendant for an indecent assault upon her, and set up in aggravation that the defendant took improper liberties with her person. The defendant offered to prove by two witnesses whom he offered, that the defendant was unchaste, and on particular occasions had been guilty of acts of lewdness. The evidence was rejected, and upon appeal to the general term the judgment of the lower court was reversed and the evidence held admissible. Potter, J., in a very able opinion reviewed the authorities and showed the admissibility of the evidence in such cases. See *Vary v. Watkins*, 7 C. & P. 308; *People v. Abbott*, 19 Wend. (N. Y.) 192; *Bracey v. Kibbe*, 31 Barb. (N. Y.) 276; *Smith v. Milburn*, 17 Iowa, 30; *People v. Benson*, 6 Cal. 221; *Rex v. Barker*, 3 C. & P. 589; *Reg. v. Martin*, 6 C. & P. 562; *Carpenter v. Wall*, 11 Ad. & El. 803.

"I take the rule to be," said Potter, J., in the case of *Ford v. Jones*, "that where character is directly in issue, specific acts may be proved; but where the issue is collateral, as upon the credibility of a witness, the proof must be confined to general reputation."

A party cannot be permitted to contradict his own witness by showing that he has made statements out of court inconsistent with those sworn to by him; but he may introduce independent evidence conflicting with that given by him, but not to impeach the witness. *Adams v. Wheeler*, 97 Mass. 67; *Stearns v. Merchants' Bank*, 53 Penn. St. 490; *Platt v. Thorn*, 8 Bosw. (N. Y. Sup. Ct.) 574; *Norwood v. Kenfield*, 30 Cal. 393; *Thorn v. Moore*, 21 Iowa, 285; *Rockwood v. Poundstone*, 38 Ill. 199; *Olmsted v. Winsted Bank*, 32 Conn. 278; *Whitney v. Eastern R. R. Co.*, 9 Allen (Mass.), 364.

In *People v. Sheehan*, 49 Barb. (N. Y.) 217, the court held that, while a party is precluded from impeaching the character of his own witness or discrediting him by evidence of general bad character, or from asserting or presenting one

written statement cannot be used as evidence for him, yet if his adversary puts such a statement in evidence against him, he is entitled to have the whole read, and

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state of facts as true, and afterward proving to the court that his prior evidence was untrue, yet, where a witness has given evidence against the side to support which he was called, and the court can see good grounds for apprehending that the witness has testified under a mistake as to the facts, or with intentional falsehood, and there is no bad faith on the part of the party calling him, he will be allowed to give evidence explaining, or even to *contradict* his own witness.

A rule similar to the above was adopted in the case of *Thornton's Ex'rs v. Thornton's Heirs*, 39 Vt. 122, and is certainly a just one; and, also, see *Coles v. Coles*, Law Rep., 1 P. & D. 138, where it was held that, where an attesting witness to a will was called, and he gave evidence against the will, that the proponents might show the *animus* of the witness to discredit his evidence against the will.

The right of a party to establish an independent fact, different from that sworn to by his witness, is generally recognized, and does not at all vitiate against the rule that a party cannot contradict or impeach his own witness. What is intended by the rule is, not that a party may not establish an independent fact different from that given by the witness, but that he shall not introduce witnesses to show that the witness has made different statements of the matter, or otherwise disparage his credit. *Brolley v. Lapham*, 14 Gray, 294; *Bradford v. Bush*, 10 Ala. 386; *Shelton v. Hampton*, 6 Ired. (N. C.) 216; *Brown v. Osgood*, 25 Me. 505; *Com. v. Starkweather*, 10 Cush. (Mass.) 59; *Machine Co. v. Walker*, 2 Foster (N. H.), 457; *Palmer v. Trower*, 14 Eng. Law & Eq. 417; and this rule applies to a case where a party calls the opposite party as a witness. *Pickard v. Collins*, 23 Barb. (N. Y.) 444. In Kentucky both methods are allowed. *Champ v. Com.*, 2 Metc. (Ky.) 17; or he may show that his witness is mistaken. *Wolfe v. Hauver*, 1 Gill (Md.), 84; and this extends even to cases where the party is not surprised by the evidence of his witness. Thus, he may disprove a statement made by him in a deposition read by the party on trial, although he was present at the taking and knew what the witness swore to. *Brown v. Osgood*, *ante*. The reason for this rule is, that every inducement should be held out to a witness to heed the obligations of an oath, and if a party, relying upon statements made by him out of court, puts him upon the stand, he is estopped from showing different statements made by him, because such proof does not establish a substantive fact, and the court will presume that the witness has, in his sworn version of the story, given what he regards as the true one; but the party may introduce proof of a different state of facts than that sworn to by the witness, because such evidence goes, not to the impeachment of the witness, but to sustain a substantive fact material to the issue. *Greenough v. Eccles*, 5 C. B. (N. S.) 786.

These are all matters that go to cast suspicion upon the evidence of a wit-

the jury may estimate the probability of any part of it  
 [ \* 363 ] \*which makes in his favor. 3. Evidence may  
 be admissible to prove a subalternate principal

ness, and to induce caution on the part of the jury in giving it weight, rather than as proof that the evidence is not to be credited at all. There are a multitude of things that enable a jury to determine how far such proof should be credited, principal among which is the *appearance* of the witness on the stand, the manner in which it was given, and its reasonableness or unreasonableness in view of the condition of the parties and the circumstances to which it relates. It is often the case that a jury give full credit to the evidence of an impeached witness, against the evidence of one whose character has not been touched. They find in the evidence intrinsic evidence of its truth; it is reasonable; it is probable; in a word, it *convincs* the minds of the jury, which is the object of all evidence. When a court or jury, by those means which cannot be regulated by arbitrary rules, find their minds inclined to credit evidence on the one side, against that on the other, no matter from what source it comes, it is generally safe to follow the promptings of the mind, and is the surest guide to truth.

The liability of men to be mistaken in what they hear as well as in what they see; the inability of any two witnesses, generally, who swear to the same contradiction, to agree as to the language used; the fact that people swearing to such contradictions generally become witnesses because of their interest in the success of the party for whom they testify; the fact that it has become a common practice, among a certain class of lawyers, to procure persons in the interest of his client to pry around the material witnesses of the adverse party with a view to getting them into some trap where a contradiction can be predicated, causes evidence of contradictory statements made out of court to be regarded with much suspicion; and it is the experience of every lawyer of any considerable practice that nine times out of ten such evidence is a sham, a fabrication, a fraud and an imposition. In criminal cases as well as in civil is this generally the case. Men go upon the stand to swear to what the prisoner has said in reference to a particular matter material to the issue. They do it often, perhaps generally, with a strong desire to secure the conviction of the prisoner, and often with a lie in their mouth, believing that "the end justifies the means," and swear away the life or liberty of a prisoner with as much *sang froid* as they would go to their dinner, while the person as to whose statements they swear is utterly powerless to disprove the statement, however false, and is not permitted to show that just before and just after the making of the statements sworn to by the witness, he gave an entirely different version of the matter, to corroborate his own evidence and discredit that of a *perjured* witness, who at one *fell swoop* swears away both his character and his life.

A witness may be never so infamous, and yet his evidence upon the stand may be given in such a way and bear such intrinsic evidence of its truth that the mind cannot resist its acceptance. It is folly to say that such evidence



fact, which might not be admissible to prove the immediate fact in issue. This is, of course, subject to the rule requiring the best evidence; for the connection between the subalternate principal fact and the ultimate evidentiary fact must be as open, visible, and un conjectural in its nature, as that between the subalternate principal fact and the fact directly in issue. In all cases, as has been well observed, the ultimate presumption must be connected either mediately or immediately with facts established by proof.<sup>1</sup>

<sup>1</sup> 2 Ev. Poth. 332.

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shall be ignored, and in this century of enlightenment and progress it is *not* ignored, but goes to the jury under proper caution from the court, and is weighed by them for what it is worth.

Human experience has long since repudiated the old maxim, *falsus in uno falsus in omnibus*, and it would be difficult to find a court so thoroughly imbued with the shades of past ages as to attempt to enforce it. Here and there are States that still cling to the old rules of the common law respecting the admissibility and weight of evidence; but the wheel of progress is rolling on, and more liberal and rational ideas of men and things are constantly being adopted, and the day is not remote, when evidence from every source pertinent to the issue will be received for what it is worth. It would be an interesting study for one who has the leisure, to look out and mark the changes for the better in this respect in the courts of this country for the last half century. They have been marked and numerous, and are indicative of that healthy progress and increased enlightenment of society, which is nowhere more marked than in the action of courts. There is room for improvement yet, but we can wait patiently, for it is sure to come.

[ \* 364 ]

## \* CHAPTER II.

## THE BURDEN OF PROOF.

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*The burden of proof, or onus probandi.*

§ 265. The burden of proof, or onus probandi, is governed by certain rules, having their foundation in principles of natural reason, to which an artificial weight is superadded by the reason and policy of law ;<sup>1</sup> and in order to form clear notions on this subject, the best course will be to consider it, first, in the abstract, and afterward as connected with jurisprudence.

*Natural principles by which it is governed.*

§ 266. Every controversy ultimately resolves itself into this, that certain facts or propositions are asserted by one of the disputant parties, which are denied, or at least not admitted, by the other. Now, where there are no antecedent grounds for supposing that what is asserted by the one party is more probable than what is denied

<sup>1</sup> Introd. pt. 2, § 42.

\*by the other, and the means of proof are equally accessible to both, the party who asserts [ \* 365 ] the fact or proposition must prove his assertion, — the burden of proof, or onus probandi, lies upon him; and the party who denies that fact or proposition need not give any reason or evidence to show the contrary, until his adversary has at least laid some probable grounds for the belief of it. The reason for this is clear. On all matters which are not the subject either of intuitive or sensitive knowledge, which are either not susceptible of demonstration, or are not demonstrated, and which are not rendered probable by experience or reason, the mind suspends its assent until proof is adduced; and where effective proofs are in the power of a party who refuses or neglects to produce them, that naturally raises a presumption that those proofs, if produced, would make against him. It is obvious that, in a complicated controversy, the burden of proving some of the matters in dispute may rest on one of the parties, while the burden of proving the rest may be on his adversary.

*Legal rule affecting.*

§ 267. One of the causes, as shown in the Introduction to this work, which renders artificial rules of evidence indispensable to municipal law, is the necessity for *speedy action* in tribunals.<sup>1</sup> In order to do complete justice, tribunals must be supplied by law with rules which shall enable them to *dispose*, one way or the other, of all questions which come before them; whatever the nature of the inquiry; or however difficult or even impossible, it may be to get at the real truth. And as the law takes nature for its model, and works on her basis as far as

<sup>1</sup> Introd. pt. 2, §§ 41, 42.

possible, the best mode of effecting this object is, to attach an artificial weight to the *natural* rules by which the burden of proof is governed, and to enforce its order more strictly than is observed in other controversies. [ \* 366 ] \*Courts of justice are not established for the decision of abstract questions—"Interest reipublicæ ut sit finis litium;"<sup>1</sup>—and, therefore, the man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or weakness of proof in his adversary.\* Hence, the great principle which has been variously expressed by the maxims, "Actori incumbit onus probandi;"<sup>2</sup> "Actori incumbit probatio;"<sup>3</sup> "Actore non probante, reus absolvitur;"<sup>4</sup> "Semper necessitas probandi incumbit illi qui agit;"<sup>5</sup> "Actore non probante: qui convenitur, etsi nihil ipse præstat, obtinebit;"<sup>6</sup> "Deficiente probatione remanet reus ut erat antequam conveniretur,"<sup>7</sup> &c. The plaintiff is bound in the first instance to show at least a *prima facie* case, and if he leaves it imperfect the court will not assist him: "Melior est conditio rei quàm actoris;"<sup>8</sup> "Favorabiliores rei potius quàm actores habentur;"<sup>9</sup> "Potior est conditio defendentis;"<sup>10</sup> "Cum sunt partium jura obscura, reo faven-

<sup>1</sup> Introd. pt. 2, §§ 41, 43.

<sup>2</sup> Vaugh. 60; Show. P. C. 221; 5 T. R. 110 (n.); 1 H. & N. 744; *Midland Railw. Co. v. Bromley*, 17 C. B. 372; *Doe d. Welsh v. Langfield*, 16 M. & W. 497.

<sup>3</sup> 4 Co. 71 b.

<sup>4</sup> Hob. 103.

<sup>5</sup> Bonnier, *Traité des Preuves*, §§ 39 & 42.

<sup>6</sup> Inst. lib. 2, tit. 20, § 4; Dig. lib. 22, tit. 3, l. 21.

<sup>7</sup> Cod. lib. 2, tit. 1, l. 4.

<sup>8</sup> Gilbert, *Corp. Jur. Canon. Prolegom. Pars Post. tit. 7, cap. 2, § 11*; No. 7.

<sup>9</sup> 4 Inst. 180.

<sup>10</sup> Dig. lib. 50, tit. 17, l. 125.

<sup>11</sup> Cowp. 343; 8 Wheat. 195.

dum est potiùs quàm actori;”<sup>1</sup> “In dubio secundùm reum potiùs quàm secundùm actorem litem dari oportet;”<sup>2</sup> “Semper in obscuris quod minimum est sequimur;”<sup>3</sup> “In obscuris minimum est sequendum,”<sup>4</sup> &c. Thus, \* where in an action for goods sold and delivered by a liquor merchant, the only evidence was [ \* 367 ] that several bottles of liquor, of what kind did not appear, were delivered at the defendant’s house, Lord Ellenborough directed the jury to presume that they were filled with the cheapest liquor in which the plaintiff dealt.<sup>5</sup> So where in an action for money lent, it appeared in evidence that the defendant having asked the plaintiff for some money, the plaintiff delivered to him a bank-note, the amount of which could not be proved, it was held by the Court of Exchequer that the jury were rightly directed, to presume it to have been for the note of lowest amount in circulation.” (a) When however the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if

<sup>1</sup> Sext. Decretal. lib. 5, tit. 12; De Regulis Juris, Reg. 11.

<sup>2</sup> Heinec. ad Pand. Pars 4, § 144.

<sup>3</sup> Dig. lib. 50, tit. 17, l. 9; 1 Ev. Poth. § 711. See, however, Dig. lib. 50, tit. 17, l. 114.

<sup>4</sup> Sext. Decretal. lib. 5, tit. 12; De Reg. Jur. Reg. 31.

<sup>5</sup> *Clunnes v. Pezzey*, 1 Camp. 8.

<sup>6</sup> *Lawton v. Sweeney*, 8 Jur. 964.

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(a) But, if the defendant has been guilty of fraud, and suppresses the means of ascertaining the truth, the presumption is in favor of the plaintiff’s demand. In *Amory v. Delamorie*, 1 Strange, 505, where a goldsmith had taken a jewel from a chimney-sweeper’s boy, who had found it, and returned him the socket in which it had been set, in trover to recover the value of it, several in the trade were examined to prove what a jewel, that would fit into the socket, of the finest water, was worth, and Pratt, C. J., directed the jury, that, unless the defendant did produce the jewel and show it *not* to be of the finest water, they should presume the strongest against him, *and make the value of the best jewels, the measure of their damages*, which was done.

true, is an answer to it, the burden of proof changes sides, and he in his turn is bound to show a *primâ facie* case at least, and if he leaves it imperfect the court will not assist him: "Agere is videtur, qui exceptione utitur: nam reus in exceptione actor est;"<sup>1</sup> "In exceptionibus dicendum est, reum partibus actoris fungi oportere;"<sup>2</sup> "Reus excipiendi fit actor;"<sup>3</sup> "In genere quicumque aliquid dicit, sive actor sive reus, necesse est ut probet."<sup>4</sup> It is in this sense that the maxim, "Semper præsumitur pro negante,"<sup>5</sup> and the expression that the law presumes against the plaintiff's demand,<sup>6</sup> are to be understood. And although the burden of proof must, in the first instance, be determined by the issues as they appear on the pleadings, or whatever according to the practice of the court and nature [ \* 368 ] of the case is analogous to pleadings, \*it may, and frequently does, shift in the course of a trial. On an indictment for libel, for example, to which the defendant pleads simply not guilty, the burden of proof would lie, in the first instance, on the prosecutor; but on proof that the document, the subject of the indictment, contained matter libelous per se, and was published by the defendant's showing it to A. B., the law would presume the publication malicious, and cast on the defendant the onus of rebutting that presumption. And if he were to prove in his defense, that it was shown to A. B. under such circumstances as to render it, *primâ facie*, a confidential communication, the burden of proof would

<sup>1</sup> Dig. lib. 44, tit. 1, l. 1.

<sup>2</sup> Dig. lib. 22, tit. 3, l. 19.

<sup>3</sup> Bonnier, *Traité des Preuves*, §§ 152, 320. See also *Devotus*, *Inst. Canon.* Lib. 3, tit. 9, § 2.

<sup>4</sup> *Matthæus de Prob. c. 8, n. 4.*

<sup>5</sup> 10 Cl. & F. 534.

<sup>6</sup> *Clunnes v. Pezzey*, 1 Camp. 8.

again change sides, and it would lie on the prosecutor to prove malice in fact.

*Test for determining—Principles regulating.*

§ 268. In order to determine on which of two litigant parties the burden of proof lies, the following test was suggested by Alderson, B., in *Amos v. Hughes*,<sup>1</sup> in 1835, *i. e.*, “*which party would be successful if no evidence at all were given* ;” and he not only applied that test in that case, as also in some subsequent cases,<sup>2</sup> but it has been adopted by other judges at *nisi prius*,<sup>3</sup> and frequently recognized by higher tribunals.<sup>4</sup> As, however, the question of the burden of proof may present itself at any moment during a trial, the test ought in strict accuracy to be expressed, “*which party would be successful if no evidence at all, or no more evidence, as the case may be, were given.*”<sup>5</sup> This of course \*depends on the principles regulating the bur- [ \* 369 ] den of proof, which we now proceed to examine more closely, first observing, however, that in many cases the burden of proof is cast by statute on particular parties.<sup>6</sup>

<sup>1</sup> 1 Moo. & R. 464. See also the observations of the same judge in *Huckman v. Fernie*, 3 M. & W. 505, and *Mills v. Barber*, 1 Id. 425.

<sup>2</sup> *Belcher v. McIntosh*, 8 C. & P. 720; *Ridgway v. Eubank*, 2 Moo. & R. 217; *Geach v. Ingall*, 14 M. & W. 100.

<sup>3</sup> *Osborn v. Thompson*, 2 Moo. & R. 254; *Doe d. Worcester Trustees v. Rowlands*, 9 C. & P. 735.

<sup>4</sup> *Barry v. Butlin*, 2 Moo. P. C. C. 484; *Leete v. The Gresham Life Insurance Society*, 15 Jurist, 1161, &c. See the judgment in *Doe v. Caldecott v. Johnson*, 7 Man. & Gr. 1047.

<sup>5</sup> See *Baker v. Batt*, 2 Moo. P. C. C. 317, 319.

<sup>6</sup> See a large number collected in Tayl. Ev. §§ 345 *et seq.* 4th Ed.; also 17 & 18 Vict. c. 104, s. 169; 23 & 24 Vict. c. 22, s. 30; 24 & 25 Vict. c. 98, ss. 9, 10, 11, 16, 17, and c. 99, ss. 6, 7, 8, &c.

*General rule—lies on the party who asserts the affirmative.*

§ 269. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute—according to the maxim “*Ei incumbit probatio, qui dicit; non qui negat;*”<sup>1</sup> a rule to which the common sense of mankind at once assents, and which, however occasionally violated in practice, has ever been recognized in jurisprudence.<sup>2</sup> One of the civilians speaks of it as “*Regula lippis et tonsoribus nota.*”<sup>3</sup>

*Fallacy of the maxim that “a negative is incapable of proof.”*

§ 270. Much misconception and embarrassment have been introduced into this subject by some unfortunate language in which the above principle has been enunciated. “*Per rerum naturam,*” says the text of the Roman law, “*factum negantis probatio nulla sit;*”<sup>4</sup> and our old lawyers lay down broadly, “It is a maxim in law that witnesses cannot testify a negative, but an affirmative.”<sup>5</sup> From these and similar expressions it has been rashly inferred, and is frequently asserted, that “a negative is incapable of proof,” a position wholly indefensible if understood in an unqualified sense. Reason and the con-

<sup>1</sup> Dig. lib. 22, tit. 3, l. 2; 1 Stark. Ev. 418, 362, 3rd Ed.; 586, 4th Ed.; Phill. & Am. Ev. 827.

<sup>2</sup> Voet. ad Pand. lib. 22, tit. 3, N. 10; Vinnius, Jurisp. Contract. lib. 4, c. 24; Domat, Lois Civiles, Part. 1, Liv. 3, tit. 6, sect. 1, §§ 6 & 7; Bonnier, Traité des Preuves, § 29; Co. Litt. 6 b; 2 Inst. 662; Gilb. Ev. 145, 4th Ed.; Stark. Ev. 585-7, 4th Ed. See some other old authorities, *supra*, bk. 1, pt. 2, § 111, n. (g).

<sup>3</sup> Matthæus de Prob. c. 8, n. 1.

<sup>4</sup> Cod. lib. 4, tit. 19, l. 23.

<sup>5</sup> Co. Litt. 6 b; 2 Inst. 662. See, also, 4 Inst. 279, and F. N. B. 107.



text of the passage in the Code alike \*show that by the phrase "per rerum naturam, &c.," noth- [ \* 370 ] ing more was meant than to express the undoubted truth that in the ordinary course of things the burden of proof is not to be cast on the party who merely denies an assertion. The ground on which this rests has been already explained;<sup>1</sup> and another grave objection to requiring proof of a simple negative is its *indefiniteness*. "Words," says L. C. B. Gilbert,<sup>2</sup> are but the expressions of facts, and therefore when nothing is said to be done, nothing can be said to be proved." "Negativa nihil implicat;"<sup>3</sup> "Negativa nihil ponunt."<sup>4</sup> A person asserts that a certain event took place, not saying when, where, or under what circumstances; how am I to *disprove* that, and convince others that at no time, at no place, and under no circumstances, has such a thing occurred? "Indefinitum æquipollet universali."<sup>5</sup> The utmost that could possibly be done in most instances would be to show the improbability of the supposed event; and even this would usually require an enormous mass of presumptive evidence. "Coment que les testm̃," it is said in a very old case in our books,<sup>6</sup> "disont par certain discretion & fait nemy estre vray, uncore il est possible que le fait est vray, et les tesm̃ scient rien de ceo; car ils ne fuř pas al' temps de confecc p̃sent, &c." Hence the well-known rule that affirmative evidence is in general better than negative evidence.<sup>7</sup> But when the negative ceases to be

<sup>1</sup> *Suprà*, § 268.

<sup>2</sup> Gilb. Ev. 145, 4th Ed.

<sup>3</sup> 30 Ass. pl. 5; Long. Quint. 22 A.

<sup>4</sup> 18 Edw. III. 44 B. pl. 50.

<sup>5</sup> 1 Vent. 368. See, also, Branch, Max. "Propositio indefinita, &c."

<sup>6</sup> 23 Ass. p. 11, per Thorpe, C. J.

<sup>7</sup> 8 Mod. 81; 2 Curt. Eccl. Rep. 434; Wills, Circ. Ev. 224, 3rd Ed.; Stark. Ev. 367, 4th Ed.

a *simple* one — when it is qualified by time, place, or circumstance — much of this objection is removed; and proof of a negative may very reasonably be required, when the qualifying circumstances are the direct matter [ \* 371 ] \*in issue, or the affirmative is either probable in itself or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative.<sup>1</sup>

*Difference between negative averments and negatives.*

§ 271. But here, two things must be particularly attended to: First, not to confound negative averments, or allegations in the negative, with traverses of affirmative allegations;<sup>2</sup> and, secondly, to remember that the affirmative and negative of the issue mean the affirmative and negative of the issue in *substance*, and not merely its

“ Affirmativa melius probatur, quam negativa, cùm negativa probari non possit. Hinc oritur regula illa vulgaris, duobus testibus affirmantibus magis credi, quam mille negantibus. \* \* \* *Natt.* dicit eam esse rationem; eo quia deponens super affirmativa potest reddere causam magis probabilem quia negativa non ita se offert sensui sicut affirmativa secundum Bal., &c. \* \* \* Primò limita hoc esse verum in negativa non coarctata loco, et tempore, quia illa non cadit sub sensum testis: \* \* \* si vero est munita loco, et tempore ita ut cadat sub sensum testis, et ex sui naturâ probari possit, ut si testis dicat illo die, et loco cum iudex ille sententiam tulisset inter Seium, et Mevium, pecunia, non domo Mevium mulctavit, ibi enim interfui et mulctam domûs irrogatam vidi: tunc par est virtus testis deponentis affirmativam, sicut negativam, et non magis creditur affirmantibus, quàm negantibus, &c.” *Mascard. de Prob. Concl.* 70. “ Probat qui asserit, non qui negat, eo quod per rerum naturam factum negantis probatio nulla est; si modo negatio facti, et negatio simplex sit, nullis circumstantiis loci aut temporis munita; nam si vel juris negatio fiat, vel facti negatio qualitatibus loci atque temporis vestita sit, ipsi neganti probatio per leges imposita est; cum huiusmodi inficiationes in se involvant affirmationem quandam.” *Voet. ad Pand. lib. 22, tit. 3, n. 10.* See also *Vinnius, Jurisp. Contract. lib. 4, c. 24*, and *Kelemen, Inst. Jur. Hungar. Privat. lib. 3, § 97.*

<sup>2</sup> *Berty v. Dormer*, 12 Mod. 526; *Harvey v. Towers*, 15 Jurist, 544, 545, per Alderson, B

affirmative and negative in *form*.<sup>1</sup> With respect to the former: if a party asserts affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does *not* exist, or that a particular thing is insufficient for a particular purpose, and such like; these, although they resemble negatives, are not \*negatives in reality—they are, in truth, positive [ \* 372 ] averments, and the party who makes them is bound to prove them. Thus, in an issue out of Chancery, directed to inquire whether certain land assigned for the payment of a legacy was deficient in value, where issue was joined upon the deficiency, the one party alleging that it was deficient, and the other that it was not; it was held by the court (Holt, C. J., presiding), that though the averring that it was deficient is such an affirmative as implies a negative, yet it is such an affirmative as turns the proof on those that plead it; if he had joined the issue that the land was not of value, and the other had averred that it was, the proof then had lain on the other side.<sup>2</sup> So, in an action of covenant against a lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises in repair at the end of the term, the proof of the breach lies on the plaintiff.<sup>3</sup>

*Determined by the affirmative in substance, not the affirmative in form.*

§ 272. Again, as already mentioned, the incumbency of proof is determined by the affirmative in *substance*,

<sup>1</sup> See *infra*, § 272.

<sup>2</sup> *Berty v. Dormer*, 12 Mod. 526.

<sup>3</sup> Ph. & Am. Ev. 828; *Harvey v. Towers*, 15 Jurist, 544, 545, per Platt, B. See also *Croft v. Lumley*, 6 H. L. C. 672.

not the affirmative in *form*.<sup>1</sup> “Quis sit affirmans, vel negans non tam ex verborum figurâ, quam eorum sententiâ reique naturâ colligitur.”<sup>2</sup> “Si issint soit come vous dits, uncore nostre affirmative comprend en luy meme ũ negative: car, &c.; issint *affirmativa præsupponit negativam*. Et en moult cases 2 affirmatives, ou un comprend un negative, feñ bon issue;” per Rolf, arguendo, H. 8 H. VI. 22 B. “Affirmativum negativum [ \* 373 ] \*implicat.”<sup>3</sup> The following cases will illustrate this. In *Amos v. Hughes*,<sup>4</sup> which was an action of assumpsit on a contract to emboss calico in a workmanlike manner; the breach was that the defendant did not emboss the calico in a workmanlike manner, but, on the contrary, embossed it in a bad and unworkmanlike manner; to which the defendant pleaded that he did emboss the calico in a workmanlike manner; on which issue was joined; Alderson, B., said that questions of that kind were not to be decided by simply ascertaining on which side the affirmative in point of form lay; that supposing no evidence was given on either side, the defendant would be entitled to the verdict, for it was not to be assumed that the work was badly executed; and consequently that the onus probandi lay on the plaintiff. In *Soward v. Leggatt*,<sup>5</sup> which was an action of covenant on a demise, whereby the defendant covenanted to repair a messuage, &c., and to paint the outside woodwork once

<sup>1</sup> *Amos v. Hughes*, 1 Moo. & R. 464; *Ridgway v. Erbank*, 2 Moo. & R. 217; *Smith v. Davies*, 7 C. & P. 307; *Soward v. Leggatt*, Id. 613; *Jefferies v. Clare*, 2 M. & W. 43, 46, per Alderson, B.

<sup>2</sup> Huberus, *Positiones Juris*, sec. Pand. lib. 22, tit. 3, N. 10. See ad id. Struvius, *Syntag. Jur. Civ. Exercit.* 28, § VI. and Vinnius, *Jurisp. Contract.* lib. 4, cap. 24.

<sup>3</sup> Branch, *Maxims*.

<sup>4</sup> 1 Moo. & R. 464.

<sup>5</sup> 7 C. & P. 613.

in every three years, and the inside woodwork within the last six years of the termination of the lease; the plaintiff alleged as breaches that the defendant did not repair the messuage, &c., and did not paint the outside woodwork once in every three years, and did not paint the inside woodwork within the last six years of the term, but, on the contrary thereof, &c.; and the defendant pleaded that he did, from time to time, at his own proper costs, &c., well and sufficiently repair the messuage, &c.; and that he did paint the outside woodwork once in every three years during the term (specifying the times); and the whole of the inside parts that were usually painted, within the last six years of the termination of the term, to wit, &c.; nor were the same ruinous, prostrate, &c., and in a bad state of order and condition for want of needful and necessary reparations, &c.; nor were the same at the end of the term \*left by the defendant so ruinous, [ \* 374 ] prostrate, &c.; concluding to the country. On these pleadings each party claimed the right to begin, contending that the burden of proof lay on him; and Lord Abinger, C. B., said, "looking at these things according to common sense we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered as the substance and effect of it. In many cases a party, by a little difference in the drawing of his pleadings, might make it either affirmative or negative, as he pleased. I shall endeavor, by my own view, to arrive at the substance of the issue." And he held that the plaintiff had the right to begin, as the burden of proof lay on him.

*-Shifted by presumptions and primâ facie evidence.*

§ 273. The burden of proof is shifted by these presumptions of law which are rebuttable, by presumptions of fact of the stronger kind, and by every species of evidence strong enough to establish a primâ facie case against a party. When a presumption is in favor of the party who asserts the negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative. The subject of presumptions in general will be treated in the Second Part of the present Book.<sup>1</sup>

*Lies on the party who has peculiar means of knowledge.*

§ 274. There is a third circumstance which may affect the burden of proof, namely, the capacity of parties to give evidence. "The law," says one of our old books,<sup>2</sup> "will not force a man to show a thing which by intendment of law lies not within his knowledge."

[ \* 375 ] \**"Lex neminem cogit ostendere quod nescire præsumitur."*<sup>3</sup> From the very nature of the question in dispute all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while the requiring his adversary to establish his case because the affirmative lay on

<sup>1</sup> *Infrâ*, Part 2, Chap. 2.

<sup>2</sup> Plowd. 46. See ad id, Plowd. 54—5, 123, 128, 129; Finch, Law, 48; 9 Co. 110; and T. 13 Edw. II. 407, tit. Covenant.

<sup>3</sup> Loft. M. 569.

him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case, by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant.<sup>1</sup> Thus where, in an action by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant offered to set off some cash notes issued by the bankrupt, payable to bearer, and bearing date before his bankruptcy; it was held that the defendant was bound to show that they came into his hands before the bankruptcy.<sup>2</sup> (*See*)

*Discrepancy in the authorities as to the extent of this rule.*

§ 275. This rule is of very general application: it holds good whether the proof of the issue involves the proof of an affirmative or of a negative, and has even been allowed to prevail against presumptions of law. But the authorities are by no means agreed as to the *extent* to which it ought to be carried. In *R. v. Turner*,<sup>3</sup> Bayley, J., says, "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge \*of the other, the party within whose knowl- [ \* 376 ] edge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative." But in

<sup>1</sup> Ph. & Am. Ev. 829; *R. v. Burdett*, 4 B. & A. 95, 140, per Holroyd, J.; *Dickson v. Evans*, 6 T. R. 57, 60, per Ashhurst, J.; *Calder v. Rutherford*, 3 B. & B. 302; *Sunderland Marine Insurance Company v. Kearney*, 16 Q. B. 925.

<sup>2</sup> *Dickson v. Evans*, 6 T. R. 57.

<sup>3</sup> Mau. & S. 206, 211.

*Elkin v. Janson*,<sup>1</sup> Alderson, B., on this dictum being quoted, said, "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the *weight* of the evidence, but there should be some evidence to start it, in order to cast the onus on the other side." And in *R. v. Burdett*,<sup>2</sup> Holroyd, J., states in the most explicit terms that the rule in question "is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."(a)

<sup>1</sup> 13 M. & W. 655, 663.

<sup>2</sup> 4 B. & A. 95, 140.

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(a) It is a well-settled rule that, except in exceptional instances, *the burden of proof is upon him who asserts the affirmative of the issue*. *Pusey v. Wright*, 31 Penn. St. 387; *Stevenson v. Maroney*, 29 Ill. 532; *Powers v. Russell*, 13 Pick. (Mass.) 69; *Nash v. Hall*, 4 Ind. 444; *Grims v. Tidmore*, 8 Ala. 746; *Costigan v. Mohawk, etc., R. R. Co.*, 2 Den. (N. Y.) 609; *Kyle v. Colmes*, 2 Miss. 121. This must, however, be understood as applying to a material and substantial issue, and is a rule, says Mr. Greenleaf in volume 1, page 103, of his work on Evidence, established for convenience. But it would, nevertheless, seem that it has a more substantial foundation and rests upon the broad ground of protection to the rights of parties, and has for its base that sound public policy which courts ever regard with strict exactness. Mere convenience either of parties or courts is not generally allowed to weigh against actual rights, and the better reason for the rule would seem to be, that when a person, by an allegation in his declaration or plea, asserts that which, if true, shows a legal right in him to recover damages of another, or which shows a legal and valid excuse against an apparent legal claim, public policy and the protection of the rights of parties require that the party making such an allegation should take the burden of its support, otherwise the rights of parties would be in constant jeopardy by their being compelled to disprove issues without foundation or validity. It is true that there is said to be a distinction between the burden of proof and the weight of evidence; but this distinction



§ 276. If this be the true principle, as it probably is, there are some cases in the books which seem to go much beyond it. At the head of these stand various

is often theoretical rather than practical, and involves so much nicety in its adjustment and determination as to be often of comparatively little value in the protection of the rights of parties. The burden of proof generally rests constantly upon the party upon whom it rests in the first instance, but the *weight* of evidence is said to depend upon its *value* and apparent strength in proving or disproving the issue. In fact, the two are so closely and intimately blended, that the distinction is not easily seen. A party having the burden of proof does not maintain the issue, except the proof be such, and its strength and value of that character, which convinces a court or jury of his right to recover. Failing in that, the task he took upon himself has not been performed, and the opposite party is entitled to a verdict. It is true that courts in their discretion will sometimes set aside verdicts as being against the weight of evidence, but all reasonable intendments are to be made in support of the verdict and, it is only in cases where the verdict is so apparently opposed to the weight of evidence as not to be in any sense fairly supported by it, that any relief can be had; so that strictly, the artificial distinction between the burden of proof and weight of the evidence is generally of but little practical value, and, in fact, it may be said that really there is no distinction. It is difficult to understand how such a distinction can exist in view of the fact that the party who takes the burden of proof is bound to maintain the issue by a fair preponderance of proof, and this certainly means that the *weight* of evidence shall be with him. Indeed, it is a well-settled rule of law that in a case where the testimony is so evenly balanced as not to admit of a conclusion being drawn from it, the verdict must be against the party upon whom the burden of proving the issue rests.

The real test by which to determine upon whom the burden of proof lies, is to be found by ascertaining which party would be entitled to a verdict if no proof was offered on either side, for the burden lies upon him against whom the verdict should be given in such a case; *Veiths v. Hagge*, 8 Iowa, 163; *Kent v. White*, 27 Ind. 390; *Ford v. Simmons*, 13 La. Ann. 397; and when the burden lies upon a party he is bound to prove each and every circumstance essential to charge the other party in the same manner as if the whole issue rested upon him, whether plaintiff or defendant; *Spaulding v. Harvey*, 7 Ind. 429; *Henderson v. State*, 14 Texas, 403; *Brandon v. Cabiness*, 10 Ala. 155; and the issue must be supported by him by a fair balance of evidence, so that a conclusion can fairly be drawn in his favor by the jury, or the verdict must be for the other party.

If the burden of proof lies upon the plaintiff or defendant, it cannot be changed and thrown upon another by the form of pleading. *State v. Melton*, 3 Mo. 417.

Indeed, it is never the *form*, but the substantive allegations of the pleadings

decisions on the game laws,<sup>1</sup> and especially *R. v. Turner*,<sup>2</sup>—which was a conviction by two justices under the stat. 5 Ann. c. 14, sect. 2, against a carrier

<sup>1</sup> Several of them are referred to in *R. v. Turner*, 5 Mau. & S. 206.

<sup>2</sup> 5 Mau. & S. 206.

that determine the burden of proof; *Loring v. Steinman*, 1 Metc. (Mass.) 204; and, while in civil actions the burden of proof may be shifted in certain cases, yet in criminal cases this never occurs except when the respondent attempts to justify his crime. *Com. v. Dana*, 2 Metc. (Mass.) 329; *Com. v. Kimball*, 24 Pick. (Mass.) 336.

As illustrative of the rule, if A sues B in an action for personal injuries received by him by reason of some act negligently done by B, the burden is upon A to prove all the facts essential to show that B was really guilty of negligence as charged by A in his declaration; and B is not required to put in negative proof unless these facts are legally established, that is, established by full proof of negligence such as would render him liable for the results charged. When the proof of A is all in, in those States in which a nonsuit is permissible without the consent of the parties, the remedy is to move for a nonsuit on the ground that the evidence fails to support the declaration; but in those States where the courts, by statute, are not permitted to nonsuit the plaintiff, the remedy should be sought by moving for a verdict for the defendant upon the ground that the evidence is not sufficient to sustain the declaration. In *Loring v. Steinman*, 1 Metc. (Mass.) 204, the court expressly held that it was incumbent upon him who takes the affirmative of an issue, whether under a declaration or plea, to maintain the issue raised by him by competent proof; and where the burden lies upon one party of proving an issue, he cannot change it or throw it upon the other party by any system of pleading. *State v. Melton*, 8 Mo. 417. Thus, in an action for the non-performance of a contract, the burden is upon the plaintiff to prove the non-performance by full proof and failing in that the defendant is entitled to a verdict. *McGregory v. Prescott*, 5 Cush. (Mass.) 67.

So where a breach of the performance of a contract is alleged by a declaration or plea, the party setting it up is charged with the burden of proving it. *Edmonds v. Edmonds*, 1 Ala. 401.

A defendant setting up matter in mitigation of damages takes the burden of establishing fully the mitigating circumstances relied on; *Murrell v. Whiting*, 32 Ala. 54; so where matter in justification is plead; *Winans v. Winans*, 19 N. J. 220; or matter in avoidance; *Gray v. Gardner*, 17 Mass. 188; *Brown v. Woodbury*, 5 Ind. 254; *Attleborough v. Middleborough*, 10 Pick. (Mass.) 378; *Jewett v. Davis*, 6 N. H. 518; or in bar.

Where a defendant, in an action on a promissory note by an indorser, denies that the note has been indorsed to the plaintiff before maturity, and therefore claims the benefit of any equities attaching in his favor against the payee, he

for having game in his possession;—and where the Court of Queen's Bench held it sufficient, if the qualifications in the 22 & 23 Car. 2, c. 25, sect. 3 were

takes the burden of proving the allegation, and the plaintiff is not bound to show when the indorsement was in fact made, the law, in the absence of proof, presuming that it was made before maturity; *Hopkins v. Kent*, 17 Md. 113; *Davis v. Bartlett*, 12 Ohio (N. S.), 534; the same is also true when the defendant sets up in his plea that the payee of the note is not the owner of the same, but has indorsed it to another who is the real owner; *Vanbuskirk v. Levy*, 3 Metc. (Ky.) 133; so where want of consideration is alleged, the burden rests upon the defendant to establish it, the law presuming, where a consideration is expressed therein, that it was given for a full and valid consideration, until the contrary is proved; *Gilbert v. Duncan*, 5 Dutcher, 521; *Quimby v. Morrill*, 47 Me. 470; *Thomas v. Quick*, 5 Blackf. (Ind.) 334; *Towsey v. Shook*, 3 id. 267; so where the consideration is claimed to be illegal; *Brigham v. Potter*, 14 Gray (Mass.), 522; *Trustees v. Hill*, 12 Iowa, 462; *Solomon v. Dreschler*, 4 Minn. 278; *Dykers v. Townsend*, 24 N. Y. 57; *Craig v. Proctor*, 6 R. I. 547; *Kidder v. Norris*, 18 N. H. 532; or usurious; *Ives v. Farmers' Bank*, 2 Allen (Mass.), 236; *Engler v. Ellis*, 16 Ind. 475; *Hale v. Hazleton*, 21 Wis. 320; and this must be by strict proof, and evidence is not admissible to prove that the party making the loan is a usurer; *Jackson v. Smith*, 7 Cow. (N.Y.) 717; so where a note is sued upon, purporting to be signed by an agent, the burden of proof is on the defendant to show want of authority. *Thompson v. Abbott*, 11 Iowa, 193.

When the holder of a note seeks to avoid want of protest and notice to the indorser, the burden is on him to establish the waiver of notice or other legal excuse or a promise to pay with full knowledge of his non-liability. *Bal-lin v. Betske*, 11 Iowa, 204; so the burden of establishing payment of a note or performance of an admitted contract is on the defendant. *Caulfield v. San-ders*, 17 Cal. 569; *McKinney v. Slack*, 4 Green (N. J.), 220; *Edmonds v. Ed-monds*, 1 Ala. 401; *Irwin v. Gernon*, 18 La. Ann. 228; *McLendon v. Hamblin*, 34 Ala. 46; *Buzzell v. Snell*, 25 N. H. 474.

An alteration in a note, mortgage or other written contract or evidence of indebtedness, must be explained by the person benefited by the alteration, as the law presumes, in the absence of proof to the contrary, that the original contract without alteration expresses the real intention of the parties. *Van Horn v. Bell*, 11 Iowa, 465; *Hill v. Cooley*, 46 Penn. St. 256; *Smith v. United States*, 2 Wall. (U. S.) 219.

Where an original entry of an account was altered, it was held that the alteration must be explained or it would be presumed to be in accordance with the facts at the time of entry; *Shiels v. West*, 17 Cal. 324; but if the alteration is not apparent the person claiming the benefit of it must prove it fully; *Davis v. Jenny*, 1 Metc. (Mass.) 221; so where a mortgage was altered, it was held in the absence of proof to the contrary that the burden was on the mort-gagee to explain the alteration, and that in the absence of proof to show that

negatived in the information and adjudication, although they were not negatived by the evidence. This decision was based altogether on the rule under con-

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the alteration was in accordance with the contract, it would be presumed that the contract was as it existed before the alteration was made; *Van Horn v. Bell*, 11 Iowa, 465; and as to whether a material alteration requiring explanation has really been made since the delivery of the contract, the court may determine. *Wood v. Steele*, 6 Wall. (U. S.) 80; *Ives v. Farmers' Bank*, 2 Allen (Mass.), 236.

Where an official document, which has always remained in the custody of the officer entitled to its charge, is altered, it will be presumed, until the contrary appears, that the alteration was rightly made. *Devoy v. New York*, 35 Barb. (N. Y.) 264.

Where previous to the inspection by the jury of a locality where a crime has been committed, a change has been made, it is incumbent upon the prosecution to show that the change does not injuriously affect the respondent. *State v. Knapp*, 45 N. H. 148.

When a party, who has formerly resided for a long time in one locality, goes to reside in another for such a time as raises a reasonable presumption of actual residence, the burden is upon him to show that his domicile is still at the place in which he has formerly resided. *Atler v. Waddell*, 20 La. Ann. 246.

See *Hart v. Horn*, 4 Kan. 232, where it is held that *fact* and *intent* must concur to work a change of domicile. See, also, *Clarke v. Territory*, 1 Wash. Ter. 82.

Where a lien has once attached in favor of a vendor, it is incumbent upon a purchaser, who claims that the lien has been quieted or lost, to maintain the fact. *Hays v. Horine*, 12 Iowa, 61.

When a person seeks to recover of a carrier for injuries received by his or its neglect, the law presumes that he was a passenger for hire and the burden of establishing the contrary is on the carrier; *Buffit v. Troy, etc., R. R. Co.*, 36 Barb. (N. Y.) 420; so in an action against a carrier of goods, it is not incumbent on the plaintiff to show negligence on the part of the carrier, but the burden is on the carrier to show that the goods were not delivered by reason of the intervention of a legal excuse; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; the rule is that it is only incumbent upon the plaintiff to show a delivery of the goods to the carrier and their loss, or if the claim is for damages done to them, the fact that they are damaged and the amount of the injury, and the *onus* is then imposed upon the carrier of showing that the loss or damage resulted from some of the perils from which they are exempted under their contract of shipment; *Shaw v. Gardner*, 12 Gray (Mass.), 488; *Steamer Niagara v. Cordes*, 21 How. (U. S.) 70; *Ill. R. R. Co. v. Cowles*, 32 Ill. 116; *Humphreys v. Switzer*, 11 La. Ann. 320; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; but in actions against common carriers of passengers, the mere fact that a passenger was injured while on his journey is not sufficient to throw the *onus* of

sideration, and the argument *ab inconvenienti* that the defendant must know the nature of his qualification \*if he had one, whereas the prosecutor would be obliged, if the burden of proof were [ \* 377 ]

proving due care on the carrier. The burden is on the party injured to make out that degree of negligence and want of care on the part of the carrier essential to charge him with liability, and he cannot rest his case until such proof is made; as, failing in that, the carrier is entitled to a verdict without the introduction of any proof whatever. *Mitchell v. Western, etc., Railroad Co.*, 30 Ga. 22.

In all cases where fraud is charged as substantive matter, whether in a declaration or plea, the party alleging it must make it out by a clear preponderance of evidence; *Beatty v. Fischel*, 100 Mass. 448; *Kline v. Horine*, 47 Ill. 430; *Hager v. Thomson*, 1 Black. (U. S.) 80; *Oaks v. Harrison*, 24 Iowa, 179; *Winslow v. Gilbert*, 50 Me. 90; *Blaisdell v. Cowell*, 2 Shepl. (Me.) 370; thus where fraud is charged in the administration of a trust, the party relying upon it takes the burden of establishing the fraud, and the evidence must be such as to overcome the presumption of a correct administration of the trust which the law raises in favor of the trustee; *Bibb v. Pope*, 43 Ala. 190; so too, where fraud is charged in a contract, all the elements necessary to establish the fraud must be made out by the party alleging it; *Smith v. Webb*, 64 N. C. 541; as where false representations in the sale of property are relied on, it must not only be proved that the representations were false, but that they were made with a *fraudulent* intent and in respect to a material matter; *Taylor v. Scoville*, 54 Barb. (N. Y.) 34; mere expressions of opinion by the vendor of property, real or personal, whether relating to its quality or quantity, even though such representations are erroneous and untrue, are not sufficient in the absence of improper motive to establish fraud either in support of an action at law or for relief in equity. The representations, in order to be actionable or relievable in equity, must have been in reference to a substantive matter, must have been relied on by the purchaser and made under such circumstances as to show a fraudulent purpose on the part of the vendor, and the burden of establishing all these facts is upon him who would avail himself of them; *Moore v. Barre*, 11 Iowa, 198; *Drake v. Latham*, 50 Ill. 270; *Curry v. Keyser*, 30 Ind. 214; *Putney v. Handy*, 99 Mass. 5; *Wheeler v. Randall*, 48 Ill. 182; *Marshall v. Gray*, 39 How. Pr. (N. Y.) 172; *Hagee v. Grossman*, 31 Ind. 223; as that the facts claimed to be false were peculiarly within the vendor's knowledge; *Sinerking v. Litzler*, 31 Ind. 13; *Paddock v. Fletcher*, 42 Vt. 389; *Morgan v. Skidmore*, 55 Barb. (N. Y.) 263; *Bradbury v. Bordin*, 35 Conn. 577; *Fackler v. Ford, McMahon* (Kan.), 21; or that he made the representations as matter of *knowledge* and not of belief, the fraud consisting in setting up his mere belief as knowledge. *Cabot v. Christie*, 42 Vt. 121; *Paddock v. Fletcher*, id. 389.

So in an action where the material question is, whether a party selling prop-

cast upon him, to negative ten or twelve different heads of qualification enumerated in the statute, which the court pronounced to be next to impossible. The 5

erty with certain defects under such circumstances that fraud is predicated of the act, it is incumbent on the party alleging the fraud to prove that the other *did not* disclose the defects; *Fleming v. Slocum*, 18 Johns. (N. Y.) 403; and indeed in all cases where the presumptions are with the defendant, the burden is on the plaintiff to fully overcome them. Thus, in all cases where fraud is alleged and relied on, the *onus* is on the plaintiff to prove it fully and by strict proof, even though it involves negative proof, because fraud is never presumed but rather the opposite; *Norris' Peake on Ev.*, p. 7; so where an action is brought for official misconduct or neglect, the presumption being that all officers discharge their duty, it is incumbent on the plaintiff to overcome this presumption by full proof and to take the burden of proof, whether the issue is affirmative or negative; as where a sheriff is charged with neglect in the service of process; *Buler v. Bullitt*, 3 Marsh. (Ky.) 280; or in the levy of an execution it is always incumbent on the plaintiff to establish the neglect by showing that the officer did not discharge his duty; *Davis v. Johnson*, 3 Munf. (Va.) 81; and so in a multitude of instances too numerous for special mention here, and, indeed, in all instances where the right of action or the validity of the defense depends upon proving that a certain act was *not* done, the party alleging it, whether plaintiff or defendant, takes the *onus* of proof. As illustrative of this, where a levy of an execution is sought to be avoided upon the ground that the sheriff has failed to give the notice required by law, the law raising a presumption in favor of the sheriff that he has performed his duty in a legal manner, the burden is upon the party attacking the levy, not only to overcome this presumption by strict proof, but to overcome by a fair preponderance of evidence all proof interposed tending to establish the presumption and to show that the notice was not given; *Hartwell v. Root*, 19 Johns. (N. Y.) 345; *Topper v. Taylor*, 6 S. & R. (Penn.) 173; so in settlement cases where a pauper is sought to be charged upon another town or county, it is always incumbent upon the town or county seeking to charge the other with the pauper's support to show that the pauper has no settlement in it; *Wilmington v. Burlington*, 4 Pick. (Mass.) 174; so in actions for malicious prosecutions, want of probable cause must be fully made out by the plaintiff. *Lane v. Crombie*, 12 Pick. (Mass.) 177; *Purcell v. McNamara*, 9 East, 361; so in criminal proceedings, while the burden is upon the State of establishing not only affirmative but also negative matter, such as the absence of provocation, or that the act was not done in self-defense in trials for murder; yet, as to all matters not connected with the body of the offense charged, and which are in defense purely, the burden is on the respondent. In *State v. Patterson*, 45 Vt. 308, the court very ably discussed the rule applicable to trials for murder as to the burden of proof in cases where there were any really exculpatory circumstances, and held that in all such cases the burden is upon the State to make

Anne, c. 14, has been repealed by the 1 & 2 Will. 4, c. 32; by the 42nd section of which, however, it is *declared* and enacted that it shall not be necessary in any pro-

out all the elements necessary to establish the principal offense, even to the extent of overcoming the force of such exculpatory circumstances. See, also, *State v. Lipscomb*, 52 Mo. 32; *State v. Murphy*, 33 Iowa, 270.

The presumption of innocence must be fully overcome by the prosecution in all criminal cases. *United States v. Gooding*, 12 Wheat. (U. S.) 460.

The party holding the affirmative of the issue, as a *general* rule, takes the *onus* of proof but there are numerous exceptions to this rule, and it may be stated as a general proposition *that in all instances where the right of action depends upon a negative averment, the party making it is charged with the burden of proving it.* This is in obedience to the rule that the burden of proof is upon him who raises an issue which would be defeated if no proof was offered. *Kent v. White*, 27 Ind. 390. The rule operates no hardship, for the reason that a party whose right of action depends upon proof that a person has not done an act which he was legally bound to do, and the neglect to do which creates a legal liability in his favor, is presumed to be prepared with proof that the act has not been done, and without such proof the bringing of an action is wholly unwarranted. There are a multitude of instances, however, where only slight proof of the affirmative of the issue is necessary to throw the burden of proving the negative upon the defendant. These are instances where the law presumes the affirmative of the issue. Thus, in an action on a promissory note, the mere production of the note, where its execution is not denied, is sufficient to establish the plaintiff's right of action, the law presuming non-payment from the fact of possession; and if the defendant sets up payment, the burden is upon him, and this is the case in all actions upon written evidence of indebtedness where the amount is liquidated.

But in actions upon book debt, the rule is different. In such cases, unless a settlement has been had, and the amount due liquidated under the hands of the parties, the plaintiff is not only compelled to prove his account, but, also, that it has not been paid; so in an action upon a bond, the mere production of the bond is not sufficient, the plaintiff is also bound to prove that the defendant has not complied with its provisions, and if there are any precedent acts to be performed by him, that he has on his part fully performed, before the burden is shifted to the defendant. There are exceptions to the general rule that he who takes the affirmative of an issue takes the burden of proof, as where the declaration or plea sets up negative matter, essential to the issue, which is peculiarly within the knowledge of the other party. In such cases the allegations are taken as true unless denied by the other party. *State v. Crowell*, 2 Shepl. (Me.) 171; *Haskill v. Com.* 3 B. Monr. (Ky.) 342; *Schleisinger v. Hexter*, 34 N. Y. Superior Ct. 499; *Ryan v. Valandingham*, 25 Ill. 128. Thus, in actions for a penalty for selling articles without a license, the fact that the party has a license being peculiarly within

ceeding against any person under that act to negative by evidence any certificate, license, consent, authority or other matter of exception or defense ; but that the party seek-

the knowledge of the defendant and susceptible of easy proof by him, the burden is upon him to show that he has complied with the law, and has a license to sell. *Wheat v. The State*, 6 Mo. 455 ; 1 *Greenleaf on Ev.* p. 111, and cases there cited. Indeed, it may be given as the general rule that *in all cases where the nature of the allegation is such as to show that the defendant is peculiarly possessed of the knowledge to disprove the issue, the law presumes the truth of the negative allegations, and the burden is upon the defendant to disprove them. But the rule never attaches except in instances where the law presumes the truth of the allegation, until the contrary is shown.* *Genig v. State*, 1 *McCord* (S. C.), 573 ; *Com. v. Kimball*, 7 *Metc.* (Mass.) 304 ; *Sheldon v. Clark*, 1 *Johns.* (N. Y.) 513 ; *Smith v. Jeffries*, 9 *Price*, 257.

In an indictment for keeping a ferry without a license, it was held that the burden is upon the defendant to show that he had a license, and that the prosecution were not obliged to introduce any evidence upon that point ; *Wheat v. State*, 6 Mo. 455 ; but in cases where the knowledge is equally accessible to both parties, so that it cannot be said to be peculiarly in the defendant, the rule is otherwise. Thus, it has been held that where licenses granted were a matter of record in a public office, and must be there recorded in order to have validity, the State is bound to show that no license was granted to the defendant. Where a person makes a will while under guardianship as a *non compos mentis*, the burden is upon the executor to show both that the testator had such mental capacity and freedom of will and action as are requisite to make a legal and valid will ; *Breed v. Pratt*, 18 *Pick.* (Mass.) 115 ; but where the insanity of the testator is set up in avoidance of the will, the party alleging it must prove it, as the law presumes the opposite. *Barton v. Scott*, 3 *Rand.* (Va.) 399 ; *Phelps v. Hartwell*, 1 *Mass.* 71 ; *Hubbard v. Hubbard*, 6 *Mass.* 397.

In an action for a breach of covenant in not supplying timber, according to the terms of the contract, where the defense was that the plaintiff did not furnish money, it was held that the *onus probandi* was upon the defendant, but that a verdict ought not to be rendered against the defendant if the proof was such that the jury had reasonable doubts as to the facts ; *Hollister v. Bender*, 1 *Hill* (N. Y.), 150 ; so in an action by an assignee under insolvent or bankrupt laws, to recover the value of property transferred by the bankrupt to one of his creditors, it is incumbent on the plaintiff to prove that the defendant had reasonable grounds to believe that the bankrupt was insolvent when the transfer was made ; *Butler v. Breck*, 7 *Metc.* (Mass.) 164 ; merely alleging a fact, without producing any evidence to support it, can in no case throw the burden upon another party of disproving it ; *Kyle v. Calmes*, 1 *How.* (Miss.) 121 ; as an allegation that a note sued upon is without consideration. *Id.*



ing to avail himself of any such certificate, license, &c., or other matter of exception or defense, shall be bound to prove the same. In the subsequent case of *Doe d.*

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The date of the assignment of a note is *prima facie* evidence of the time when it was assigned. *Byrd v. Tucker*, 3 Pike (Ark.), 451.

Where a party has once acquired a domicile in a town, and is there taxed, in a suit for the same, the burden is upon him to show that he had really abandoned his domicile there, before the tax is assessed; *Kilburn v. Bennett*, 3 Metc. (Mass.) 199; so in an action between two towns for the support of a married woman who is a pauper, the burden is on the plaintiff town to show that she has a settlement in the defendant town, and if the defendant town seeks to avoid liability upon the ground that her husband had a settlement in some other town, the burden of proving this is on the defendant, the rule being that a person, seeking to avoid liability by setting up new matter, takes the burden of proof as to such matter; *Randolph v. Easton*, 23 Pick. (Mass.) 242; so where, in an action between two towns for the settlement of a pauper, the defendant admits that the pauper once had a residence in it, but claims that he has since gained a residence in the plaintiff town, the burden is on the defendant to establish the issue; *Kilburn v. Bennett*, 3 Metc. (Mass.) 199; so in a case where the seizin of the party at a given time is admitted or proved, the legal presumption is that it continues, and one who sets up a disseizin takes the burden of proof of overcoming the presumption and establishing a disseizin by full proof. *Brown v. King*, 5 Metc. (Mass.) 173.

Where, in an action of ejectment, the plaintiff claims to recover by reason of the breach of a condition subsequent, he is bound to prove the breach, even though a negative. *O'Brien v. Doe*, 6 Ala. 787.

Where either party claims under a document signed by a public agent, the signature must be proved whether denied or not. *Yo-nee-gus-kee v. Coleman*, 3 Hawks (N. C.), 174.

So in a *qui tam* action against a clerk for issuing a license to marry a female under age, the plaintiff is not bound to prove that consent was not given, the record of the fact being *prima facie* evidence of it, and in the custody of the clerk, he is bound to produce it if he justifies under it; *Blaun v. Beal*, 5 Ala. 357; so in a *qui tam* action against a minister for marrying a minor the burden of proving the parents' consent is on him; *Medlock v. Brown*, 4 Mo. 379. In a trial for a criminal offense, the prosecution is bound to prove actual guilt even to the extent of negating facts that would exclude it. Thus, it was held in *The People v. Bodine*, 1 Denio (N. Y.), 281, that proof by the State that a murder had been committed, and that the house in which the body was found was set on fire, under circumstances that warranted a suspicion that it was fired by the perpetrator, it was not enough to show that the respondent *might* have been at the scene of the fire, to change the *onus* of proof upon the respondent to account for his presence, but that it must show that he was *in fact* there.

*Bridger v. Whitehead*,<sup>1</sup> which was an ejectment by a landlord against a tenant on an alleged forfeiture by breach of a covenant in his lease, to insure against fire in some

<sup>1</sup> 8 A. & E. 571.

The law presumes every person to be innocent until they are proved to be guilty of a crime, and this presumption is so strong that the prosecution must, before it rests its case, make out the person's guilt by such evidence as leaves no reasonable doubt, or he will be entitled to an acquittal without the introduction of any rebutting proof; *United States v. Gooding*, 12 Wheat. (U. S.) 460; and where the evidence is circumstantial, the rule is that the jury, in order to convict the prisoner, must find the circumstances clearly proved *as facts*, and when they are so found, they must be of such force and character as clearly and unequivocally imply the prisoner's guilt, and not consistent with any reasonable hypothesis of his innocence. If they can be reasonably reconciled with any hypothesis of his innocence, he is entitled to the benefit of that hypothesis, and it would be error for a jury to convict. *United States v. Douglass*, 2 Blatchf. (U. S.) 207; *Ogletree v. State*, 28 Ala. 693; *State v. Newman*, 7 id. 69; *Com. v. Kimball*, 24 Pick. (Mass.) 366; *Com. v. Dana*, 2 Metc. (Mass.) 329.

Indeed, so strong is this presumption of innocence and honesty of purpose on the part of every member of society, it is held that in a civil action where the facts of a case present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the courts will, unless the weight of evidence is decidedly in favor of the hypothesis of dishonesty, strike the balance in favor of innocence and honesty of purpose. *Greenwood v. Lowe*, 7 La. Ann. 197.

The rule does not go to the extent of excluding *any* doubt as to the prisoner's guilt, but is confined to *reasonable* doubts, such doubts as lead a juror to hesitate about convicting the prisoner, as do not leave the mind satisfied that a verdict of guilty should be rendered, and such as would lead a reasonable man to hesitate about acting against it in the ordinary relations of life. It is not a question whether the jury *must believe* in his guilt, but whether, while the mind inclines to the prisoner's guilt, there is yet such a doubt remaining in his mind as leads him to hesitate about convicting him; whether there is any reasonable hypothesis in view of all the evidence consistent with the prisoner's innocence. If so, the prisoner is entitled to the benefit of the doubt, as the prosecution has failed to maintain the issue raised by it by full proof, which requires it to show the prisoner's connection with the crime beyond a reasonable doubt.

As to the burden of proof in the case of lost notes or evidences of indebtedness, the rule is, that where the instrument is admitted once to have existed, the creditor is merely bound to prove its loss, and the burden is upon the defendant to prove payment or satisfaction of the claim; *Bell v. Young*, 1

office in or near London, it was contended that it lay on the defendant to show that he had insured, that being a fact within his peculiar knowledge; the old argument ab

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Grant (Penn.), 175; so in *McIlroy v. Cochran*, 3 Litt. (Ky.) 454, it was held that where the loss of a note is alleged and it is admitted by the defendant that such a note once existed, a legal consideration is presumed, and the holder will not be compelled to substantiate the original transaction or show its non-payment.

But the loss must be clearly proved, otherwise all the presumptions as to its contents will be against the holder. *Little v. Marsh*, 2 Ired. (N. C.) 331.

In the case of an instrument mutilated or destroyed by a person who is a party to it, every thing which can be, will be presumed against him when it is offered in evidence, and the burden will be upon him to explain the mutilation or destruction, and the exact legal character and effect of the instrument originally. *Kent v. Bottoms*, 3 Jones (N. C.), 78; *Haleyburton v. Kershaw*, 3 Des. (S. C.) 105; *Henderson v. Hake*, 1 D. & B. (N. C.) 119.

#### PRIMA FACIE EVIDENCE.

While it is true that a person seeking a recovery of another in an action at law is charged with the burden of proving the issue in his favor, yet whenever the law interposes any presumptions in his favor it often happens that he is only called upon to make *prima facie* proof. Therefore it is material to know what, in law, is regarded as *prima facie* evidence, so that its production by a party puts the other party in a position that he must rebut it, to prevent a recovery against him. *Prima facie* evidence may be said to be such evidence as in law is regarded as sufficient to entitle a party to a recovery until it is fairly overcome by rebutting proof. *Kelly v. Jackson*, 6 Peters (U. S.), 622.

Thus, in an action upon a promissory note, the plaintiff is only required, in the first instance, to produce the note on trial, and the law presuming from its possession by him that it is still an outstanding obligation upon the makers and indorsers, its production makes, for the plaintiff, a *prima facie* case, and the burden is imposed upon the defendant to overcome the effect of this *prima facie* case, or the plaintiff will be entitled to a judgment for the amount apparently due upon it. *Conway v. Williams*, 2 Hun (N. Y.), 642.

So, in an action of trover, possession of a chattel is *prima facie* evidence of title and imposes upon the plaintiff the *onus* of proving title in the chattel in himself, or that he has a right to its possession as against the defendant, and he must do this by such proof as fully overcomes the presumption of property in him who has possession. *Pinkham v. Gear*, 3 N. H. 484; *Finch v. Alston*, 2 S. & P. (Ala.) 83; *Drummond v. Hopper*, 4 Harr. (Del.) 327; *Trougott v. Byers*, 5 Cow. (N. Y.) 480; *Goodwin v. Garr*, 8 Cal. 615; *Entreken v. Brown*, 32 Penn. St. 364; *Vining v. Baker*, 53 Me. 44; *Fish v. Skut*, 21 Barb. (N. Y.) 333.

This presumption of title to personal property in him who has possession,

inconvenienti was strongly urged that the plaintiff could not bring persons from every insurance office in or near London to show that no such insurance had been effected

is so strong that it is held that all species of personal property found among the effects of a deceased person belong to his heirs, and that if any person claims to be the owner thereof he must make out his title by clear and unmistakable proof of ownership in him, and beyond a doubt; *Succession of Alexander*, 18 La. Ann. 337; but possession of personal property by the consent of the true owner does not raise a legal presumption of title against the owner, but only against others; *Magee v. Scott*, 9 Cush. (Mass.) 148; and where property is found in the possession of several, the law refers the possession to him who has the true title, and this is the rule both as to real and personal estate; *Maples v. Maples*, Rice (S. C.), 300; *Lenoir v. Rainey*, 15 Ala. 667; *Governor v. Campbell*, 17 id. 566; *Miller v. Fraley*, 23 Ark. 735; so prior possession of land is *prima facie* evidence of a title in fee, and is good until a better title is proved; *Herbert v. Herbert*, Breese, 278; *Hawkins v. County Commissioners*, 2 Allen (Mass.), 251; *Ward v. McIntosh*, 12 Ohio St. 231; *Hunt v. Titter*, 15 Ind. 318; but such title may be overcome by one who has a better title thereto, and when a better title is established, the possession of the premises, if short of the statutory period, will be presumed to be in subordination to the title of the real owner, as adverse possession is never presumed by the law. But the *onus* of establishing the real title is upon him who sets it up; *Allen v. Harper*, 59 Me. 371; *Baldwin v. Buffalo*, 35 N. Y. 375; *Rowland v. Updike*, 28 N. J. 101; *Brandt v. Ogden*, 1 Johns. (N. Y.) 156; *Edmonston v. Shelton*, 4 Jones (N. C.), 451; *Austin v. Bailey*, 37 Vt. 219; *McCall v. Pryor*, 17 Ala. 533; *Russell v. Marks*, 3 Metc. (Ky.) 57; *Rochell v. Holmes*, 2 Bay (S. C.), 487; but when title is claimed by adverse possession without *color* of title, the *onus*, as against one having a clear documentary title, is on him who sets up the possessory title; *Rowland v. Updike*, 28 N. J. 101; *Stewart v. Cheatham*, 3 Yerg. (Tenn.) 60; *Clifton v. Lilly*, 12 Tex. 130; and all presumptions will be against him, and he will be required to make out his possessory title by strict proof; *Edmonston v. Shelton*, 4 Jones (N. C.), 451; *Baldwin v. Buffalo*, 35 N. Y. 375; but as against every person, except one having a clear documentary title, possession is sufficient and all presumptions will be made in its favor. *Nixon v. Carce*, 28 Miss. 414; *Clifton v. Lilly*, 12 Tex. 130; *Wendell v. Blanchard*, 2 N. H. 456.

It must be understood that a presumption of title from possession never arises except when the possession is perfectly consistent with an unqualified ownership. When it is shown that it was taken in subordination to the title of another, and that only a qualified interest or estate less than an absolute title was claimed, a grant will not be presumed. *Colvin v. Warford*, 20 Md. 357. Where the death of a party becomes a material issue, a grant of letters of administration is *prima facie* sufficient evidence of his death; *French v. Frazer*, 7 J. J. Marsh. (Ky.) 425; so proof that he was missing at a particular

by the defendant; and *R. v. Turner* and some other cases of that class were cited. But the court refused to accede to this view. Lord Denman, C. J., in delivering judg-

time, and the circulation of a report and general belief that he was dead, is *prima facie* evidence of his death; *Jackson v. Etz*, 5 Cow. (N. Y.) 314; or that he has been absent and not heard from for seven years; *Whiteside's Appeal*, 23 Penn. St. 114; *Bradley v. Bradley*, 4 Whart. (Penn.) 173; *Eagle v. Emmett*, 4 Bradf. (N. Y.) 117; *Osborn v. Allen*, 26 N. J. 388; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; *Stevens v. McNamara*, 36 Me. 176; *Crawford v. Elliott*, 1 Houst. (Del.) 465; *Smith v. Knowlton*, 11 N. H. 191; *Caper v. Thurmond*, 1 (Ga.) 538; *Tilley v. Tilley*, 2 Bland (Md.), 436; *Primm v. Stewart*, 7 Tex. 178; *Spurr v. Taimbull*, 1 A. K. Marsh. (Ky.) 278; *Winship v. Connor*, 42 N. H. 341; *Stinchfield v. Emerson*, 52 Me. 465; *Hulett v. Hulett*, 40 Vt. 384. The record of the discharge of an insolvent or bankrupt debtor is *prima facie* evidence of notice to all his creditors; *Jay v. Slack*, 1 South. (N. J.) 77; so an entry in a day book is *prima facie* evidence of the price and delivery of the goods charged there; *Ducoign v. Schneppl*, 1 Yeates (Penn.), 347; *McCoul v. Lekamp*, 2 Wheat. (U. S.) 111; so an entry in a log book is *prima facie* evidence of the truth of every particular of such entry; *Douglass v. Eyre*, Gilpin, 147; so an acknowledgment of the payment of the purchase-money in a deed is *prima facie* evidence of the fact; *Thallhimer v. Brinkerhoff*, 6 Cow. (N. Y.) 90; *Gully v. Grubbs*, 1 J. J. Marsh. (Ky.) 387; so a receipt is *prima facie* evidence of all it purports to be, and no more; *McDowell v. Lemaitre*, 2 N. & M. 320; therefore a receipt for so much money for property delivered is not *prima facie* evidence that it is in full for all such property previously delivered; *Reed v. Phillips*, 4 Scam. (Ill.) 39; so is a bill of lading; *Benjamin v. Sinclair*, 1 Bailey, 174; or a certificate of pre-emption has been held to be *prima facie* evidence of title as against any other certificate or survey; *Rector v. Welch*, 1 Mo. 334. The record of a recovery in an ejectment suit is *prima facie* evidence of title to the premises involved in the action; *Chirac v. Reinecker*, 2 Pet. (U. S.) 622; a decree in admiralty restoring the libeled property to the claimant is *prima facie* evidence of title thereto; *Thompson v. Stewart*, 3 Conn. 171; a judgment on an original attachment in another State is *prima facie* evidence of the debt, even though obtained without notice; *Miller v. Pennington*, 2 Stew. 399; so is a judgment against a party not brought into court; *Taylor v. Pettibone*, 16 Johns. (N. Y.) 66; so is a sentence in a foreign court of admiralty unless it contains enough to rebut such presumption; *Johnson v. Ludlow*, 1 Caines' Cases, 30; so where an act of the legislature directs that the certificate of a public officer shall be evidence, a paper produced with his name will be *prima facie* evidence unless it is proved not to have been signed by him; *Prather v. Johnson*, 3 H. & J. (Md.) 487; so where books of account or papers contain distinct settlements made at different times, the last settlement is *prima facie* evidence of the fact that it embraces all the others; *Dorsey v. Kollock*, Coker, 35; so a receipt acknowledging payment of

ment, said, "I do not dispute the cases on the game laws which have been cited ; but there the defendant is in the first instance shown to have done an act which was un-

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a subsequent quarter's rent is treated as *prima facie* evidence that all the prior rent is paid ; *Brewer v. Knapp*, 1 Pick. (Mass.) 332 ; the return of an officer upon a warrant is regarded as *prima facie* evidence of an arrest, against both the grand juror and officer ; *Allen v. Gray*, 11 Conn. 95 ; so the date of a writ or other process is *prima facie* evidence of the true time when it was issued ; *Society for Prop. of Gas v. Whitcombe*, 2 N. H. 227 ; but the date of a deed, or contract, is only *prima facie* evidence of the time when it was executed as between the parties thereto ; *Baker v. Blackburn*, 5 Ala. 517. The return of a sheriff is *prima facie* evidence of what was done by him in a controversy between strangers to the suit in which it was made ; *Gray v. Gray*, 3 Litt. 465 ; so the return of a sheriff on the back of an attachment is *prima facie* evidence of the property, so as to bind it on execution for the payment of the debt ; *Huyer v. Osborne*, 1 Bay, 319 ; so an execution book kept by the clerk is *prima facie* evidence of the truth of all entries made in it, but it may be impeached by extrinsic evidence ; *Taylor v. Dundas*, 1 Wash. (U. S.) 92 ; an order drawn upon one for money for value received is *prima facie* evidence that the drawer has received the money or its equivalent ; *Child v. Moore*, 6 N. H. 33 ; so an order payable out of a specific fund is *prima facie* evidence of debt ; *Curle v. Beers*, 3 J. J. Marsh. (Ky.) 170 ; so where an order is given by A to B on C for certain property, B's receipt upon the order for the property is *prima facie* evidence in an action by C against A of the delivery of the property ; *Rawson v. Adams*, 17 Johns. (N. Y.) 130.

The fact that a testator is under guardianship as a *non compos* at the time of the execution of a will, is *prima facie* evidence that the testator had not the requisite mental capacity to make it. *Stone v. Damon*, 12 Mass. 488.

The production of a contract or deed bearing the same name with the party in the suit, is *prima facie* evidence of identity ; *Jackson v. King*, 5 Cow. (N.Y.) 237 ; *Brown v. Metz*, 33 Ill. 339 ; *Cates v. Loftus*, 3 A. K. Marsh. (Ky.) 202 ; *Cooper v. Parton*, 1 Dur. (Ky.) 92 ; *Gitt v. Watson*, 18 Mo. 274 ; but otherwise if the name is not strictly identical ; *Ellsworth v. Moore*, 5 Iowa, 486 ; *Burford v. McCue*, 53 Penn. St. 427 ; and where a party claims an interest in an estate, something more than identity of name is required. *Maers v. Bunker*, 29 N. H. 420.

The invoice of a cargo is, against the general principles of evidence, uniformly admitted as *prima facie* evidence of the *value* of the cargo, but of nothing more. *Graham v. Penn. Ins. Co.*, Wash. C. C. (U. S.) 118.

The register of a vessel in a certain name, is not even *prima facie* evidence that such person was the owner of the vessel. *Sharp v. U. S. Ins. Co.*, 14 Johns. (N. Y.) 201 ; *Leonard v. Huntington*, 15 id. 303.

A register's deed, purporting to be a conveyance of land sold for taxes is

lawful unless he was qualified; and the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and

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*prima facie* evidence that his proceedings were regular. *Bodley v. Hood*, 2 A. K. Marsh. (Ky.) 244.

Proof that a person has resided in a place is *prima facie* evidence that such place is still his residence. *Prother v. Palmer*, 4 Pike (Ark.), 456.

Proof of the execution and registry of a mortgage deed is *prima facie* evidence of title in the mortgagee without the production of the note which it was given to secure. *Davis v. Mills*, 18 Pick. (Mass.) 394.

The return of a constable on a writ is *prima facie* evidence of the facts contained in it, but may be rebutted. *Perryman v. The State*, 8 Mo. 208.

The fact that a vessel was sea-worthy when a policy attached is *prima facie* evidence that it continued so during the time of the risk. *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389.

The agreement of adjoining owners upon a dividing line is *prima facie* evidence that it is the true line. *Sparhawk v. Bullard*, 1 Metc. (Mass.) 95.

A receipt for money, and expressed to be in full of all demands, is, however, only *prima facie* evidence of payment, and may be contradicted, varied or explained. They are not subject to the rule which excludes parol evidence to contradict or vary a written instrument. *Hill v. Robinson*, 3 Jones (N. C.), 501; *Borden v. Hope*, 21 La. Ann. 581; *Batdorf v. Albert*, 59 Penn. St. 59; *Dolan v. Frieberg*, 4 W. Va. 101; *The Galloway C. Morris*, 2 Abb. (U. S.) 164; *Middlesex v. Thomas*, 20 N. J. 39; *Pati's Case*, 4 Ct. of Claims (U. S.), 523; *Joslyn v. Capron*, 64 Barb. (N. Y.) 599; *Driver v. Hudspeth*, 16 Ala. 348; *Brooke v. Quinn*, 13 Md. 379; *Rourke v. Story*, 4 E. D. Smith (N. Y. C. P.), 54; *Mt. Olivet Cemetery Co. v. Shubert*, 2 Head (Tenn.), 116; *Gibson v. Hanna*, 12 Mo. 162; *Smith v. Ballou*, 1 R. I. 496. But all presumptions are in favor of the receipt, and the party attacking it must clearly show that its legal effect is not as expressed to be on the face of it; and, when the evidence is contradictory, and the evidence on the one side is entitled to as much weight as that on the other, the receipt will stand. *Borden v. Hope*, *ante*; *Levi v. Carrick*, 13 Iowa, 344. Thus, a receipt may be shown to have been fraudulently obtained; *Clark v. Devereaux*, 1 S. C. 172; *Russell v. Church*, 65 Penn. St. 9; *The Galloway C. Morris*, 2 Abb. (U. S.) 164; to have been given under a mistake; *Russell v. Church*, 65 Penn. St. 9; *Joslyn v. Capron*, 64 Barb. (N. Y.) 599; *Dodd v. Mason*, 39 Ga. 605; *Walker v. Christian*, 14 Gratt. (Va.) 291; *Elwell v. Leslie*, 2 Halst. (N. J.) 349; or in full, when a part only of the debt was received, and that even, when no fraud was practiced, no mistake made, and the party giving it was laboring under no error or fraud whatever; *Ryan v. Ward*, 48 N. Y. 204; *Hope v. Johnson*, 11 Rich. (S. C.) 135; *Jones v. Ricketts*, 7 Md. 108; or when it is clearly apparent that it does not embrace the intention of the parties, the real intention may be shown; *Grumley v. Webb*, 44 Mo. 444; or when the meaning is doubtful, the real intention of the

takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly [ \* 378 ] within the defendant's \*knowledge; but that does not vary the rule of law. And the land-

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parties may be shown; *Walker v. Christian*, 14 Gratt. (Va.) 291; *Learned v. Bellows*, 8 Vt. 79; or when it was obtained under such circumstances that a court of equity would relieve the party against its effect; *Fuller v. Crittenden*, 9 Conn. 401; but, where there is no fraud, mistake, or evident misconception of rights, and the demand covered by the suit is unliquidated, a receipt is conclusive, and a bar to all actions which it in its terms, or by fair interpretation, covers. *Nelson v. Blanchfield*, 54 Barb. (N. Y.) 630; *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183; *Bonell v. Chamberlain*, 26 Conn. 487; *Holbrook v. Blodgett*, 5 Vt. 520; *Beers v. Broome*, 4 Conn. 467; *Goddard v. Cutts*, 2 Fairfax (Me.), 440. Neither are admissions made in a receipt conclusive upon the party giving it. Thus, where a member of a religious society gave a receipt for money paid him, and therein stated that he had "withdrawn himself" from the society, it was held that this did not estop him from maintaining a bill in equity setting up his wrongful exclusion from the society, and demanding an accounting and payment to him of his share of the assets. *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. (U. S.) 66. Shipping receipts, expressed to be in full on account to date, are held to be open to contradiction by parol proof. *Dolan v. Frieberg*, 4 W. Va. 101. A receipt may be shown to be without consideration and consequently void. *Seymour v. Minturn*, 17 Johns. (N. Y.) 169; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122; *Sigourney v. Sibley*, 21 Pick. (Mass.) 101; *Stamper v. Hayes*, 25 Ga. 546. Thus, where A, who had taken from B a contract to do a certain piece of work, but who, after doing a part of it, had been prevented by B from completing the balance, upon the receipt from B of the amount due for the work already done, gave him a receipt "in full satisfaction of the work already done under the contract, which is hereby canceled," it was held that A was not thereby precluded from recovering of B the damages sustained by him by reason of the breach of the contract, for the reason that he had only been paid what was due him for work done, and consequently there was no consideration for the release of damages for the breach of the contract; *Foersch v. Blackwell*, 14 Barb. (N. Y.) 607; but, if there is *any* consideration, however slight, the exact value of which cannot be measured, the receipt will be operative, and a bar to all claims which it purports to discharge. Thus, a receipt in which it is stated that the person giving it has received a horse, in full of all demands to date, or any other property, the value of which is not expressed in the receipt, will operate as a discharge of all demands properly embraced within the provisions of the receipt, even though it is apparent that the value of the property received is very much less than the demand or demands discharged. So a receipt may be shown to have been obtained by duress. *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183. But a receipt under seal operates as a release of all demands



lord might have had a covenant inserted in the lease to insure at a particular office, or to produce a policy when called for on pain of forfeiture. If he will make the

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fairly embraced within its terms, and cannot be attacked except upon the ground of fraud; and parol evidence is not admissible to defeat, alter or vary its effect, at common law, and the question of fraud is for the jury, and not for the court to determine. *Eastman v. Wright*, 6 Pick. (Mass.) 316; *Loring v. Brackett*, 3 id. 403; *Coon v. Knapp*, 3 N. Y. 375. Such a receipt operates as a release, and being in the nature of an executed contract under seal, if there are any elements of mistake or misconception in it, the remedy is in a court of equity either for a reformation of the contract, or to set it aside. So a receipt given in full for unliquidated claims or damages, as damages for personal injuries received, if free from fraud, is in the nature of a release, and is a bar to any action upon the original claim. *Coon v. Knapp*, 3 N. Y. 375; *Brown v. Cambridge*, 3 Allen (Mass.), 474.

The seal of the general land office, and the signature of the commissioner thereof, *prima facie* prove themselves. *Harris v. Doe*, 4 Blackf. (Ind.) 369.

Recitals of title in an old deed, where possession accompanied the deed, are *prima facie* evidence against any person claiming title under the grantor previous to such deed. *James v. Letzler*, 8 W. & S. (Penn.) 192.

The possession of checks, orders or drafts by the corporation or person on whom they were drawn, is *prima facie* evidence that they have been paid. *Union Canal Co. v. Lloyd*, 4 W. & S. 393.

A settlement between two parties is *prima facie* evidence of a settlement of all demands, but may be rebutted, and is no bar to a recovery for any matters not embraced therein. *Nichols v. Scott*, 12 Vt. 47.

An indorsement on a note is *prima facie* evidence of payment of the amount designated. *Graves v. Moor*, 7 Monr. (Ky.) 341.

A receipt in full of all demands is *prima facie* evidence of payment of all notes, accounts and claims existing at the time of the receipt. *Marston v. Wilcox*, 1 Scam. (Ill.) 270.

The acceptance, by a municipal corporation, of work which it was authorized to contract for, is *prima facie* evidence that the work is completed. *New Orleans v. Halpin*, 17 La. Ann. 185.

Proof of an entry upon another's premises is *prima facie* sufficient to support an action of trespass, and throws the *onus* upon the defendant of proving that his entry was lawful. *Belverman v. State*, 16 Texas, 130.

Every person is presumed to know the contents of all papers to which he himself subscribes, or authorizes another to sign his name, whether he can read or write, and the production of an instrument thus signed is *prima facie* evidence of all it contains; *Harris v. Story*, 2 E. D. Smith (N. Y. C. P.), 363; *Bank v. Kimball*, 10 Cush. (Mass.) 373; *Clem. v. N. & L. R. R. Co.*, 9 Ind. 488; and that he knew the legal effect thereof; *Mears v. Graham*, 8 Blackf. (Ind.) 144; but such evidence may be rebutted by proof of fraud or of undue advantage. *Harris v. Story*, *ante*.

conditions of his lease such as to render the proof of a breach very difficult, the court cannot assist him." This ruling seems upheld by subsequent cases.<sup>1</sup>

§ 277. It remains to add that the difficulties attending the application of this principle to criminal charges have been felt in America as well as here, as appears from the following passage in Greenl. Evid. vol. 3, § 24, note (2), 2nd Ed.

"The question as to the burden of proving the negative averment of disqualification in the defendant, arising from his *want of license* to do the act complained of, was fully considered in *The Commonwealth v. Thurlow*, 24 Pick. 374, which was an indictment for selling spirituous liquors without license. The Chief Justice [Shaw] delivered the judgment of the court upon this point in the following terms :

"The last exception necessary to be considered is that the court ruled that the prosecutor need give no evidence in support of the negative averment that the defendant was not duly licensed, thereby throwing on him the burden of proving that he was licensed, if he intends to rely on that fact by way of defense. The court entertain no doubt that it is necessary to aver in the indictment, as a substantive part of the charge, that the defendant, at the time of selling, was not duly licensed. How far, and whether under various circumstances, it is necessary to prove such negative averment, is a question of great difficulty, upon which there are conflicting authorities. Cases may be suggested of

[ \* 379 ] \*great difficulty on either side of the general question. Suppose, under the English game

<sup>1</sup> *Wedgwood v. Hart*, 2 Jurist, N. S. 288 ; *Price v. Worwood*, 4 H. & N. 512.

laws, an unqualified person prosecuted for shooting game without the license of the lord of the manor, and after the alleged offense and before the trial, the lord dies, and no proof of license, which may have been by parol, can be given? Shall he be convicted for want of such affirmative proof, or shall the prosecution fail for want of proof to negative it? Again, suppose under the law of this Commonwealth it were made penal for any person to sell goods as a hawker and peddler, without a license from the selectmen of some town in the Commonwealth. Suppose one prosecuted for the penalty, and the indictment, as here, contains the negative averment, that he was not duly licensed. To support this negative averment, the selectmen of more than three hundred towns must be called. It may be said that the difficulty of obtaining proof is not to supersede the necessity of it, and enable a party having the burden, to succeed without proof. This is true; but when the proceeding is upon statute, an extreme difficulty of obtaining proof on one side, amounting nearly to impracticability, and great facility of furnishing it on the other, if it exists, leads to a strong inference that such course was not intended by the legislature to be required. It would no doubt be competent for the legislature so to frame a statute provision, as to hold a party liable to the penalty, who should not produce a license. Besides, the common-law rules of evidence are founded upon good sense and experience, and adapted to practical use, and ought to be so applied as to accomplish the purposes for which they were framed. But the court have not thought it necessary to decide the general question; cases may be affected by special circumstances, giving rise to distinctions applicable to them to be considered as they arise. In the present case, the court

are of opinion that the prosecutor was bound to produce [ \* 380 ] *prima facie* evidence that the defendant \*was not licensed, and that no evidence of that averment having been given, the verdict ought to be set aside. The general rule is, that all the averments necessary to constitute the substantive offense must be proved. If there is any exception, it is from necessity, or that great difficulty, amounting, practically, to such necessity; or in other words, where one party could not show the negative, and where the other could with perfect ease show the affirmative. But if a party is licensed as a retailer under the statutes of the Commonwealth, it must have been done by the county commissioners for the county where the cause is tried, and within one year next previous to the alleged offense. The county commissioners have a clerk and are required by law to keep a record, or memorandum in writing, of their acts, including the granting of licenses. This proof is equally accessible to both parties, the negative averment can be proved with great facility, and therefore, in conformity to the general rule, the prosecutor ought to produce it, before he is entitled to ask a jury to convict the party accused.' 24 Pick. 380, 381. This point has since been settled otherwise, in *Massachusetts*, by stat. 1844, ch. 102, which devolves on the defendant the burden of proving the license. So it is held at common law, in *North Carolina*, *The State v. Morrison*, 3 Dev. 299. And in *Kentucky*, *Haskill v. The Commonwealth*, 3 B. Monr. 342. And in *Maine*, *The State v. Crowell*, 12 Shepl. 171. And in *Indiana*, *Shearer v. The State*, 7 Blackf. 99." See, also, on this subject, *The Commonwealth v. Kimball*, 24 Pick. 366.

## \* CHAPTER III.

[ \* 381 ]

## HOW MUCH MUST BE PROVED.

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*Rule—Sufficient if the issues, &c., raised are proved in substance.*

§ 278. The just and reasonable principle, that tribunals should look to the meaning rather than to the language of the pleadings, or other statements of litigant parties, is not confined to the burden of proof, but extends to the proof itself. The rule of law from the

[ \* 382 ] \* earliest times has been, that it is sufficient if the issues, &c., raised are proved *in substance*.<sup>1</sup> This is in truth only a branch of a still more general principle which runs through every rational system of jurisprudence.—“*Lex rejicit superflua*,”<sup>2</sup> “*Superflua non nocent*,”<sup>3</sup> “*Utile per inutile non vitiatur*.”<sup>4</sup>

*Averments and statements wholly immaterial may be disregarded.*

§ 279. The most obvious application of this rule is in the case of averments and statements wholly immaterial. All averments, which might be expunged from the record without affecting the validity of the pleading in which they appear, may be disregarded at the trial; for such averments only incumber the record, and the proof of them would be as irrelevant as themselves.<sup>5</sup> And there can be no doubt that the same principle applies to allegations and statements made otherwise than in formal pleadings. All this, however, must be understood of pleadings which show a good ground of action or defense in law; for it is a rule that a bad pleading must be proved in omnibus to entitle the party pleading it to a verdict.<sup>6</sup>

<sup>1</sup> Litt. ss. 483, 484, 485; Co. Litt. 227 a, 281 b, 282 a; Hob. 73, 81; 2 Rol. 41-2; Tryals per Pais, 140, Ed. 1665; 1 Phill. Ev. 558, 10th Ed.; 1 Stark. Ev. 431, 3rd Ed.; Id. 625, 4th Ed. For earlier authorities see bk. 1, pt. 2, § 111, p. 185, note 1.

<sup>2</sup> Jenk. Cent. 3, cas. 72.

<sup>3</sup> Jenk. Cent. 4, cas. 74; Cent. 8, cas. 41.

<sup>4</sup> Co. Litt. 3 a, 227 a, 379 a; 3 Co. 10 a; 10 Co. 110 a; Hob. 171; 2 Saund. 369; 1 Stark. Ev. 432, 3rd Ed.; Id. 625, 4th Ed. “Non solent, quæ abundant, vitiare scripturas:” Dig. lib. 50, tit. 17, l. 94. “Utile non debet per inutile vitiari:” Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. Reg. 37.

<sup>5</sup> 1 Phill. Ev. 558, 567, 568, 10th Ed.; 1 Stark. Ev. 432, 3rd Ed.; Id. 626, 4th Ed.

<sup>6</sup> *Walker v. Goe*, 3 H. & N. 405; *Mardall v. Thelluson*, 6 E. & B. 908, per Cresswell, J.

*But not when they affect what is material.*

§ 280. But matter which need not have been stated may be injurious, or even fatal, when it affects that which is material. A party may allege or prove things \*which he was not bound to allege or prove, but which, when alleged or proved, put his case out [ \* 383 ] of court.<sup>1</sup> Thus, where, before the 15 & 16 Vict. c. 76, s. 64, a party in giving express color stated a *true* title in his adversary instead of a defective one, the latter was entitled to judgment on the pleader's own showing.<sup>2</sup> It is accordingly a rule that averments, though unnecessarily introduced, cannot be rejected when they operate by way of description or limitation of essentials.<sup>3</sup> "Let an averment of this kind," says an eminent authority on evidence,<sup>4</sup> "be ever so superfluous in its own nature, it can never be considered to be immaterial when it constitutes the identity of that which is material."

*The tribunal should ascertain the real question between the parties — Illustrations from old authorities.*

§ 281. This rule does not merely absolve from proof of irrelevant matter. It has a far more general application; and means that the tribunal by which a cause is tried should examine the record or allegations of the contending parties, or of their advocates, as the case may be, with a legal eye, in order to ascertain the real question raised between them. In illustration we shall first

<sup>1</sup> 1 Edw. V., 3, pl. 5; Keilw. 165 b, pl. 2; Plowd. 32, 84; Finch, Law, 65; and *Lush v. Russell*, 5 Exch. 203.

<sup>2</sup> Steph. Plead. 245, 5th ed.

<sup>3</sup> 1 Stark. Ev. 443, 3rd Ed.; Ph. & Am. Ev. 853; 1 Phill. Ev. 567, 10th Ed.; *Webb v. Ross*, 5 Jurist, N. S. 126, 127, per Martin, B.

<sup>4</sup> 1 Stark. Ev. 443, 3rd Ed.

cite some old authorities, both because they are very apposite, and also to show that the rule under consideration is not an arbitrary invention of modern times — a light in which it is too common to view all the rules of evidence.

§ 282. “If,” says Littleton,<sup>1</sup> “a man bring a writ of entry in casu proviso, of the alienation made by the tenant in dower to his disinherittance, and counteth of [ \* 384 ] \*the alienation made in fee, and the tenant saith, that he did not alien in manner as the demandant hath declared, and upon this they are at issue, and it is found by verdict that the tenant aliened in tail, or for term of another man’s life, the demandant shall recover: yet the alienation was not in manner as the demandant hath declared.” “Also,<sup>2</sup> if there be lord and tenant, and the tenant hold of the lord by fealty only, and the lord distrain the tenant for rent, and the tenant bringeth a writ of trespass against his lord for his cattle so taken, and the lord plead that the tenant holds of him by fealty and certain rent, and for the rent behind he came to distrain, &c., and demand judgment of the writ brought against him, quare vi et armis, &c., and the other saith that he doth not hold of him in the manner as he suppose, and upon this they are at issue, and it is found by verdict that he holdeth of him by fealty only; in this case the writ shall abate, and yet he doth not hold of him in the manner as the lord hath said. For the matter of the issue is, whether the tenant holdeth of him or no; for if he holdeth of him, although that the lord distrain the tenant for other services which he ought not to have, yet such a writ of trespass quare vi et armis,

<sup>1</sup> Litt. sect. 483.

<sup>2</sup> Litt. sect. 484.



&c., doth not lie against the lord, but shall abate." "Also, in a writ of trespass for battery, or for goods carried away, if the defendant plead not guilty, in manner as the plaintiff suppose, and it is found that the defendant is guilty in another town, or at another day than the plaintiff supposes, yet he shall recover. And so in many other cases these words, viz., in manner as the demandant or the plaintiff hath supposed, do not make any matter of substance of the issue, &c." In illustration of this the two following cases, supported by the authority of an early Year Book, are given by Sir Edward Coke. "In assize of darreine \*presentment, if the plaintiff allege the avoid- [ \* 385 ]  
ance of the church by privation, and the jury find the voidance by death, the plaintiff shall have judgment: for the manner of voidance is not the title of the plaintiff, but the voidance is the matter." If a guardian of an hospital bring an assize against the ordinary, he pleadeth that in his visitation he deprived him as ordinary, whereupon issue is taken, and it is found that he deprived him as patron; the ordinary shall have judgment, for the deprivation is the substance of the matter."<sup>3</sup>

#### *Other instances.*

§ 283. The books contain many other instances of the effect of this rule.<sup>4</sup> Thus, in an action on a bond, a plea of *solvit ad diem* is supported by proof of payment *ante diem*,<sup>5</sup> for the payment so as to save the penalty is the matter in issue. In an action against a tenant for

<sup>1</sup> Id. sect. 485.

<sup>2</sup> Co. Litt. 282 a; 6 Edw. III. 41 b, pl. 22.

<sup>3</sup> Co. Litt. 282 a; 8 Edw. III. 70, pl. 37; 8 Ass. pl. 29.

<sup>4</sup> For other instances to be found in the old books, see 2 Rol. Abr. 681, Evidence (D).

<sup>5</sup> Ph. & Am. Ev. 846; 1 Phill. Ev. 559, 10th Ed.

waste in cutting down a certain number of trees, proof that the defendant cut down a less number maintains the issue.<sup>1</sup> Although in actions on contracts the contract must be correctly stated, and proved as laid; yet every day's practice shows that in actions on simple contract, as also in actions of tort, the plaintiff may recover for a less sum than that claimed in the declaration. And in actions of tort, generally, it is sufficient to prove a substantial portion of the trespasses or grievances complained of, &c.

*Application of the rule in criminal cases — At common law.*

§ 284. The rule in question is not confined to civil cases.<sup>2</sup> It is a principle running through the whole criminal law, that it is sufficient to prove so much of an indictment as charges the accused with a substantive [\* 386] \* crime.<sup>3</sup> And what averments in an indictment are so separable and divisible from the rest, that want of proof of those averments shall not vitiate the whole, forms an important head of practice. For instance: on an indictment for burglary and stealing goods in the house, the averments of breaking and stealing are divisible, so that if the burglary be not proved the accused may be convicted of larceny;<sup>4</sup> as he also may on a charge of robbery, where it appears that the taking was not with violence.<sup>5</sup> And on an indictment for murder the accused may be (and often is) convicted of manslaughter; for the substance of the offense charged is the

<sup>1</sup> Co. Litt. 282 a; Ph. & Am. Ev. 847.

<sup>2</sup> Co. Litt. 282 a; Ph. & Am. Ev. 849; 1 Phill. Ev. 562, 10th Ed.

<sup>3</sup> 1 Phill. Ev. 562, 10th Ed.; *R. v. Hunt*, 2 Camp. 583.

<sup>4</sup> 1 Hale, P. C. 559.

<sup>5</sup> Id. 534, 535, *Harman's case*.

felonious slaying,—malice aforethought being only an aggravation.<sup>1</sup> By several modern statutes, also, a like principle has been extended to various offenses not actually charged in an indictment. Thus, by the 24 & 25 Vict. c. 100, s. 60, a person indicted for child murder, may, though acquitted of the murder, be convicted of the misdemeanor of concealing the birth of the child. By the 7 Will. 4 & 1 Vict. c. 85, s. 11, it was enacted, that on the trial of any person for certain offenses mentioned in that statute, or for any felony whatever, where the crime charged should include an assault against the person, it should be lawful for the jury to acquit of the felony and find a verdict of guilty of assault, &c. This statute has been repealed by 14 & 15 Vict. c. 100, which contains several very important provisions on this subject.

Section 9. "If, on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offense charged, but that he was guilty only of an attempt to commit the same, such person shall \*not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return [ \* 387 ] as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner, as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried, as herein lastly mentioned, shall be liable to be afterward prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

<sup>1</sup> Bro. Ab. Corone, pl. 221; Co. Litt. 282 a; Gilb. Evid. 269, 4th Ed.

Section 11, repealed by 24 & 25 Vict. c. 95, and re-enacted by the 24 & 25 Vict. c. 96, s. 41. "If, upon the trial of any person upon any indictment for robbery, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried, as is herein lastly mentioned, shall be liable to be afterward prosecuted for an assault with intent to commit the robbery for which he was so tried."

Section 12. "If, upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterward prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge [ \* 388 ] the jury from giving any verdict upon \*such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

Section 13, repealed by 24 and 25 Vict. c. 95, and re-enacted with amendments by 24 & 25 Vict. c. 96, s. 72. "If, upon the trial of any person indicted for embezzlement, or fraudulent application or disposition, &c., it

shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application or disposition as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterward prosecuted for larceny, fraudulent application or disposition, or embezzlement, upon the same facts."

\*Section 14, repealed by 24 and 25 Vict. c. 95, and re-enacted with amendments by 24 & 25 Vict. [ \* 389 ] c. 96, s. 94. "If, upon the trial of any two or more persons indicted for jointly receiving any property, it shall

be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of such property."

*Variance—Amendment of variances.*

§ 285. But although the law is thus liberal in looking through mere form in order to see the real substance of the questions raised, a positive *variance* or discrepancy between a pleading and the proof adduced in support of it was always fatal—a rule absolutely necessary to prevent the opposite party from being unfairly taken by surprise, and the whole system of pleading converted into a snare. Still this principle, however salutary in itself, was certainly carried too far; and indeed it would be strange if the supersubtile spirit, which in the fourteenth and fifteenth centuries took possession of our pleadings, had not extended its influence to their proof.<sup>1</sup> The consequence was that the best causes were continually lost through variances of the most unimportant kind: in order to obviate the danger of which, practitioners resorted to the plan of stating the same cause of complaint in different counts; and, whenever they could obtain leave of the court under the statute 4 Ann. c. 16, stating the same subject-matter of defense in different pleas, varied only in circumstances. For replications and subsequent pleadings there was no help whatever;<sup>2</sup> and the devices just mentioned, while they added very considerably to the intricacy of \*pleadings and expense of suits, [ \* 390 ] had not always the desired effect. The atten-

<sup>1</sup> See Co. Litt. 303 a, 304 a and b.

<sup>2</sup> By 15 & 16 Vict. c. 76, s. 81, several matters may now, by leave of the court or a judge, be pleaded at any stage of the pleadings.

tion of the legislature was at length turned to the subject. The 9 Geo. 4, c. 15, empowers every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general jail delivery, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such judge or court shall think reasonable; and enacts that thereupon the trial shall proceed as if no such variance had appeared.

*In civil cases.*

§ 286. This statute, it is obvious, went a very short way toward remedying the evil. It was, however, afterward met more vigorously in civil cases by the (Pleading) Rules of H. T. 4 Will. 4, to which was given the force of an act of parliament, and by the statute 3 & 4 Will. 4, c. 42. The 5th of those rules, after reciting that "by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore; and by the act of 3 & 4 Will. 4, c. 42, s. 23" (passed a few months before), "the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged," orders that "several counts shall not be allowed unless a distinct subject-matter of complaint is intended

to be established in respect of each ; nor shall several pleas, or avowries, or cognizances be allowed, unless a  
[ \* 391 ] \* distinct ground of answer or defense is intended to be established in respect of each, &c.” The Pleading Rules of H. T. 16 Vict., which also have the force of an act of parliament (RR. 1 and 2), prohibit several counts on the same cause of action, and several pleas, replications, or subsequent pleadings, or several avowries or cognizances, founded on the same ground of answer or defense ; reserving power, however, to the court or a judge to allow such, if proper for determining the real question in controversy between the parties on its merits, &c.

§ 287. The statute 3 & 4 Will. 4, c. 42, s. 23, referred to in the above rule, enacts, “that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth, on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defense, to be forthwith amended by some officer of the court or otherwise, &c., on such terms as to payment of costs to the other party, or postponing the trial to be had before the same



or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such \*court or judge [ \* 392 ] not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defense, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, &c., as if no such variance had appeared, &c.: provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at nisi prius, sheriff or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet." And by the 24th section "the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court or the court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could

not have prejudiced the opposite party in the conduct of the action or defense, give judgment according to the very right and justice of the case."

*The Common Law Procedure Act.*

§ 288. The power of amendment in civil cases generally has been much increased by the Common Law Procedure Acts, 15 & 16 Vict. c. 76, 17 & 18 Vict. [ \* 393 ] \*c. 125, and 23 & 24 Vict. c. 126. The portions of the first of these statutes bearing on the present subject are as follows: The 35th section enacts, "In case it shall appear at the trial of any action that there has been a misjoinder of plaintiffs, or that some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such nonjoinder, specifying therein the name or names of such person or persons, such misjoinder or nonjoinder may be amended, as a variance, at the trial by any court of record holding plea in civil actions, and by any judge sitting at nisi prius, or other presiding officer, in like manner as to the mode of amendment, and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances" under 3 & 4 Will. 4, c. 42, "if it shall appear to such court, or judge, or other presiding officer, that such misjoinder or nonjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons, to be added as aforesaid, consent, either in person or by writing, under his, her, or their hands, to be so joined, or that the person or persons, to be struck out as aforesaid, were originally intro-

duced without his, her, or their consent, or that such person or persons consent, in manner aforesaid, to be so struck out; and such amendment shall be made upon such terms as the court, or judge, or other presiding officer, by whom such amendment is made, shall think proper; and when any such amendment shall have been made, the liability of any person or persons, who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action." The 37th section, after giving power to the court or \*a judge in the case of the joinder of [ \* 394 ] too many defendants in an action of contract, to strike out the superfluous ones before trial, proceeds to enact, that "in case it shall appear at the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance, at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the court, or judge, or other presiding officer, by whom such amendment is made, shall think proper." By the 222nd section, "it shall be lawful for the Superior Courts of Common Law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is any thing in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary, for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made."

By the 96th section of the second of these statutes, a like power of amendment is given of all defects and errors in any proceedings under its provisions; with this difference, that it says all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made "if duly applied for." The third gives with respect to proceedings under its provisions a like power with the second.

§ 289. The power of amendment has been extended by other statutes to other kinds of proceedings. *E. g.*, by the 16 & 17 Vict. c. 107, s. 263, "In all suits or proceedings at the suit of the Crown for the recovery of [ \* 395 ] \*any duty or penalty, or the enforcement of any forfeiture under any act relating to the customs, the like amendments may be made by the court or judge as may be made in civil actions." By 20 & 21 Vict. c. 77, s. 37, on the trial of questions by a jury under the order of the Court of Probate, that Court has the same power, jurisdiction and authority as a judge at nisi prius; and by 20 & 21 Vict. c. 85, s. 38, the same holds in trials by jury under the order of the Court for Divorce and Matrimonial Causes. And by 22 & 23 Vict. c. 21, s. 9, it is enacted, that "section 222 of 'The Common Law Procedure Act, 1852,' shall extend to all suits and proceedings on the revenue side of the Court of Exchequer."

*Effect of these statutes.*

§ 290. In exercising the discretion vested in them by these statutes, courts and judges are of course much guided by the decisions which have taken place on the subject, and which, it must be acknowledged, are by no

means in conformity with each other.<sup>1</sup> It will be sufficient to state that, in the first place, it seems no judge ought to make an amendment the effect of which would be to deprive him of jurisdiction over the cause.<sup>2</sup> Again, as these statutes were passed to carry out the spirit of the law, and not to supersede it, no pleading ought to be amended so as to render it bad in law.<sup>3</sup> Under the 3 & 4 Will. 4, c. 42, s. 23, it was held that a judge ought not to amend a plea so as to render it liable to special demurrer; and since special demurrers are abolished, it would probably be considered that he \*ought not to amend a pleading so as to render it calculated to prejudice, embarrass or delay an opponent within the meaning of the 15 & 16 Vict. c. 76, s. 52. And, lastly, it is to be observed generally, that the courts in banc are very chary of interfering with the discretion of judges at nisi prius in granting or refusing amendments, unless where the point is reserved for their consideration by consent of parties at the trial. [\* 396]

*In criminal cases.*

§ 291. It will be observed that, while the 9 Geo. 4, c. 15, extends to trials for misdemeanors, the 3 & 4 Will. 4, c. 42, s. 23, the Common Law Procedure Acts—the 15 & 16 Vict. c. 76, 17 & 18 Vict. c. 125, 23 & 24 Vict. c. 126—and the other statutes above referred to, are, for the most part, restricted to civil cases. But the 11 & 12

<sup>1</sup> See a large number collected in the note to *Bristow v. Wright*, 1 Smith, L. C. 570, 5th Ed.

<sup>2</sup> *Wickes v. Grove*, 2 Jur. N. S. 212, 213, per Martin, B.

<sup>3</sup> *Evans v. Powis*, 1 Exch. 601; *Martyn v. Williams*, 1 H. & N. 817; *Bury v. Blogg*, 12 Q. B. 877; *Graham v. Gracie*, 13 Id. 548; *Hughes v. Bury*, 1 Fost. & F. 374.

<sup>4</sup> *Bury v. Blogg*, 12 Q. B. 887; *Hassall v. Cole*, 13 Jurist, 630.

Vict. c. 46, s. 4, empowers any court of oyer and terminer and general jail delivery, if such court shall see fit so to do, to cause the indictment or information for any offense whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed in the same manner in all respects, &c., as if no such variance or variances had appeared.

§ 292. A far greater alteration in the law on this part of the subject has, however, been effected by the 14 & 15 Vict. c. 100, some portions of which have been already referred to. This statute enacts in its first section that "Whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any [ \* 397 ] \*variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offense charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offense, or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whom-

soever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, &c., as if no such variance had occurred, &c.: Provided that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite \*the recognizances of the prosecutor and witnesses, and of the de- [ \* 398 ] fendant, and his surety or sureties, if any, accordingly, &c.: Provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn."

[ \* 399 ]

## \*PART II.

## THE SECONDARY RULES OF EVIDENCE.

§ 293. The secondary rules of evidence, as has been already stated, are those rules which relate to the *modus probandi*, or mode of proving the matters that require proof,<sup>1</sup> and for the most part only affect evidence *in causâ*.<sup>2</sup> The fundamental principle of the common law on this subject is, that THE BEST EVIDENCE MUST BE GIVEN — a maxim the general meaning of which has been explained in a former part of this work.<sup>3</sup> In certain cases, however, peculiar forms of proof are either prescribed or authorized by statute. We propose to treat the whole matter in the following order:—

1. Direct and Circumstantial evidence.
2. Presumptive evidence, Presumptions, and Fictions of law.
3. Primary and Secondary evidence.
4. Derivative evidence in general.
5. Evidence supplied by the acts of third parties.
6. Opinion evidence.
7. Self-regarding evidence.
8. Evidence rejected on grounds of public policy.
9. Authority of *Res judicata*.
10. Quantity of evidence required.

<sup>1</sup> *Suprà*, § 249.

<sup>3</sup> Bk. 1, pt. 1, §§ 87 *et seq.*

<sup>2</sup> Bk. 1, pt. 1, § 86.



## \* CHAPTER I.

[ \*400 ]

## DIRECT AND CIRCUMSTANTIAL EVIDENCE.

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*Two forms of judicial evidence — Direct evidence — Circumstantial evidence — Conclusive — Presumptive.*

§ 294. All judicial evidence is either *direct* or *circumstantial*. By “Direct evidence” is meant when the principal fact, or *factum probandum*, is attested *directly* by witnesses, things or documents. To all other forms the term “Circumstantial evidence” is applied; which may be defined, that modification of *indirect* evidence, whether by witnesses, things or documents, which the law deems sufficiently proximate to a principal fact or *factum probandum*, to be receivable as evidentiary of it. And this also is of two kinds, *conclusive* and *presumptive*: “Conclusive” when the connection between the principal and evidentiary facts — the *factum probandum* and *factum probans* — is a *necessary* consequence of the laws of nature; as where a party accused of a crime shows that, at the moment of its commission, he was at another place, &c.: “Presumptive,” when the inference of the principal fact from the evidentiary is only *probable*, whatever be the degree of persuasion which it may generate.<sup>1</sup>

<sup>1</sup> Introd. pt. 1, § 27.

*Direct and circumstantial evidence equally admissible.*

[ \* 401 ]      \* § 295. As regards *admissibility*, direct and circumstantial evidence stand, generally speaking, on the same footing. It might at first sight be imagined that the latter, especially when in a presumptive shape, is inferior or secondary to the former, and, by analogy to the principle which excludes secondhand and postpones secondary evidence,<sup>1</sup> ought to be rejected, at least when direct evidence can be procured. The law is, however, otherwise, and a little reflection will show the difference between the cases. Secondhand and secondary evidence are rejected, because they derive their force from something kept back—the non-production of which affords a presumption that it would, if produced, make against the party by whom it is withheld. But circumstantial evidence, whether conclusive or presumptive, is as *original* in its nature as direct evidence:—they are distinct modes of proof, acting as it were in parallel lines, wholly independent of each other. Suppose an indictment against A. for the murder of B., killed by a sword. If C. saw A. kill B. with a sword, his evidence of the fact would be *direct*. If, on the other hand, a short time before the murder, D. saw A. with a drawn sword, walking toward the spot where the body was found, and after the lapse of a time long enough for its commission, saw him returning with the sword bloody; these *circumstances* are wholly independent of the evidence of C.—they derive no force whatever from it—and, coupled with others of a like nature, might generate quite as strong a persuasion of guilt. Besides, the rule, that facts are provable by circumstances as well as by

<sup>1</sup> See *infra*, ch. 4 and 3.

direct testimony, has a considerable effect in preventing guilty or dishonest parties from tampering or making away with witnesses and other instruments of evidence, which they would be more likely to do, if they knew that the only evidence against them that the law would receive was contained in a few \*easily-ascertained depositories. Still, the non-production [ \* 402 ] of direct evidence which it is in the power of a party to produce is matter of observation to a jury,' as indeed is the suppression of any sort of proof. And here it is essential to observe that the process of reasoning, evidencing any fact, principal or subalternate, may be more or less complex, longer or shorter. The inference may be drawn from one evidentiary fact, or from a combination — usually, although perhaps not very accurately, termed a *chain*,<sup>2</sup>—of evidentiary facts.<sup>3</sup> Again, the facts from which the inference is drawn may be either themselves proved to the satisfaction of the tribunal, or they may be merely consequences, necessary or probable as the case may be, of other facts thus proved.<sup>4</sup>

<sup>1</sup> 1 Stark. Ev. 578, 3rd Ed.; Id. 874, 4th Ed.; 2 Ev. Poth. 340; 3 Benth. Jud. Ev. 230.

<sup>2</sup> "It has been said that circumstantial evidence is to be considered as a *chain*, and each piece of evidence as a link in the chain; but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength." Per Pollock, C. B., in *Reg. v. Exall*, 4 F. & F. 922, 929.

<sup>3</sup> 3 Benth. Jud. Ev. 223.

<sup>4</sup> 2 Ev. Poth. 332; 3 Benth. Jud. Ev. 3.

*Comparison between direct and presumptive evidence — Advantages of direct over presumptive evidence — Advantages of presumptive over direct evidence.*

§ 296. Direct and presumptive evidence (using the words in their technical sense) being, as has been shown, distinct modes of proof, have each their peculiar advantages and characteristic dangers. Abstractedly speaking, presumptive evidence is inferior to direct evidence, seeing that it is in truth only a substitute for it, and an indirect mode of proving that which otherwise might not be provable at all.<sup>1</sup> Hence a given portion of credible direct evidence must ever be superior to an equal portion of credible presumptive evidence *of the same fact*. But in practice it is, from the nature of [ \* 403 ] \*things, impossible, except in a few rare and peculiar cases, to obtain more than a very limited portion of direct evidence as to any fact, especially any fact of a criminal kind ; and with the probative force of such a limited portion of direct evidence, that of a chain of evidentiary facts, forming a body of presumptive proof, may well bear comparison. When proof is direct, as, for instance, where it consists of the positive testimony of one or two witnesses, the matters proved are more proximate to the issue, or, to speak correctly, are identical with the physical facts of it, and consequently leave but two chances of error, namely, those which arise from mistake or mendacity on the part of the witnesses ; while in all cases of merely presumptive evidence, however long and apparently complete the chain, there is a third, namely,

<sup>1</sup> Gilb. Ev. 157, 4th Ed ; *R. v. Burdett*, 4 B. & A. 95, 123; Theory of Presumptive Proof, p. 55.

that the inference from the facts proved may be fallacious. Besides, there is an anxiety felt for the detection of crimes, particularly such as are very heinous or peculiar in their circumstances, which often leads witnesses to mistake or exaggerate facts, and tribunals to draw rash inferences; and there is also natural to the human mind a tendency to suppose greater order and conformity in things than really exists, and likewise a sort of pride or vanity in drawing conclusions from an isolated number of facts, which is apt to deceive the judgment.<sup>2</sup> Sometimes, also, hasty and erroneous conclusions in such cases are traceable to indolence, or to aversion for the patient and accurate consideration of minute and ever-varying particulars.<sup>3</sup> Accordingly, the true meaning of the expressions in our books, that all presumptive evidence of felony should be warily pressed, admitted cautiously, &c., is not that it is incapable \*of producing a degree of assurance equal [ \* 404 ] to that derivable from direct testimony, but that in its application tribunals should be upon their guard against the peculiar dangers just described. Such are its disadvantages. But then on the other hand, a chain of presumptive evidence has some decided advantages over the direct testimony of a limited number of witnesses. These are thus clearly stated by an able modern writer.<sup>4</sup>

"1. By including in its composition a portion of circumstantial evidence, the aggregate mass on either side is,

<sup>1</sup> 3 Benth. Jud. Ev. 249; Ph. & Am. Ev. 459; Bonnier, *Traité des Preuves*, § 637.

<sup>2</sup> Bacon, *Nov. Organ. Aphor.* 45; *R. v. Hodge*, 2 Lew. C. C. 227, per Alderson, B.; Ph. & Am. Ev. 459; Burrill, *Circ. Ev.* 207. See further, *infra*, sect. 3, subsect. 2.

<sup>3</sup> Burrill, *Circ. Ev.* 207.

<sup>4</sup> 3 Benth. Jud. Ev. 251-2. See, also, Paley's *Moral and Political Philosophy*, bk. 6, ch. 9.

if mendacious, the more exposed to be disproved. Every false allegation being liable to be disproved by any such notoriously true fact as it is incompatible with ; the greater the number of such distinct false facts, the more the aggregate mass of them is exposed to be disproved ; for it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognizance of the judge. 2. Of that additional mass of facts, thus apt to be brought upon the carpet by circumstantial evidence, parts more or less considerable in number will have been brought forward by so many different deposing witnesses. But, the greater the number of deposing witnesses, the more seldom will it happen that any such concert, and that a successful one has been produced, as is necessary to give effect to a plan of mendacious testimony, in the execution of which, in the character of deposing witnesses, divers individuals are concerned. 3. When, for giving effect to a plan of mendacious deception, direct testimony is of itself, and without any aid from circumstantial evidence, regarded as sufficient ; the principal contriver sees before him a comparatively extensive circle, within which he may expect to find a mendacious witness, or an assortment of mendacious witnesses, sufficient to his [ \* 405 ] \*purpose. But where, to the success of the plan, the fabrication or destruction of an article of circumstantial evidence is necessary, the extent of his field of choice may find itself obstructed in this way by obstacles not to be surmounted.

Lest too much reliance should be placed on these considerations, it is important to observe that circumstantial evidence does not always consist, either in a large number of circumstances, or of circumstances attended by a

large number of witnesses, and also that the more trifling any circumstance is in itself, the greater is the probability of its being inaccurately observed, and erroneously remembered.<sup>1</sup> But, after every deduction made, it is impossible to deny that a conclusion drawn from a process of well-conducted reasoning on a mass of evidence purely presumptive may be quite as convincing, and in some cases far *more* convincing than one derived from a limited portion of direct evidence.<sup>2</sup>

## \* CHAPTER II.

[ \* 406 ]

PRESUMPTIVE EVIDENCE, PRESUMPTIONS AND FICTIONS OF  
LAW.

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*Design of this chapter.*

§ 297. The nature and admissibility of both direct and presumptive evidence having been considered in the preceding chapter, we proceed in the present to examine the latter more in detail, together with the kindred subjects of presumptions and fictions of law.

<sup>1</sup> 19 Ho. St. Tr. 74, note.

<sup>2</sup> 1 East, P. C. 223: *Annesley v. The Earl of Anglesea*, 17 Ho. St. Tr. 1430, per Mounteney, B.; Parley's Mor. Philos. bk. 6, ch. 9.

*Probative force of a chain of presumptive proof.*

§ 298. The elements or links which compose a chain of presumptive proof are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence and consistency* of those elementary circumstances. A number of circumstances, each individually very slight, may so tally and confirm each other as to leave no room for doubt of the fact which they tend to establish.<sup>1</sup> “Infirmiora [argumenta] congreganda sunt. \* \* \* Singula levia sunt, et communia: universa vero nocent, etiamsi non ut fulmine, [ \* 407 ] tamen ut grandine.”<sup>2</sup> Not to speak of \* greater numbers; even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone.<sup>3</sup> Thus, on an indictment for uttering a bank note, knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing, or next to nothing; any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof adduced, that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong.<sup>4</sup> If, however, all the circumstances

<sup>1</sup> For a good instance, see *Richardson's case*, Append. No. 1.

<sup>2</sup> Quint. Inst. Orat. lib. 5, c. 12.

<sup>3</sup> 3 Benth. Jud. Ev. 242.

<sup>4</sup> *R. v. Wylie, or Whiley*, 1 B. & P. N. R. 92, 2 Leach, C. L. 983; *R. v. Ball*, R. & R. C. C. 132, 1 Campb. 324; *R. v. Green*, 3 Car. & K. 209. See also *R. v. Jarvis*, 1 Dears. C. C. 552, and *R. v. Foster*, Id. 456.



proved arise from one source, they are not *independent* of each other; and an increase in the number of the circumstances will not, in such a case, increase the probability of the hypothesis.<sup>1</sup> It is of the utmost importance to bear in mind that, where a number of *independent* circumstances point to the same conclusion, the probability of the justness of that conclusion is not the *sum* of the simple probabilities of those circumstances, but is the compound result of them.<sup>2</sup> \* Lastly, the circumstances composing the chain must all be [\* 408]

<sup>1</sup> Beccaria, *Dei Delitti e delle Pene*, § 7; 1 Stark. Ev. 567, 3rd Ed.; Id. 851, 4th Ed.

<sup>2</sup> 1 Stark. Ev. 568, 3rd Ed.; Id. 853, 4th Ed.; 2 Ev. Poth. 342. The position, that the degree of assurance of the guilt of an accused person, derived from a long and connected chain of presumptive evidence, may equal, and in many cases far exceed, that derived from a limited portion (and in most criminal cases it must necessarily be a very limited portion) of direct testimony, is strongly illustrated by the mathematical formulæ of the calculus of probabilities, to which reference has been made in the Introduction to this work, pt. 2, § 73, p. 115, note 2. Suppose two persons, A. and B., are charged with two distinct acts equally criminal—say, for instance two distinct murders—and, in order to simplify the question, let us conceive the probability of the principal fact equal in both cases. The evidence against A. is altogether direct, consisting of the positive testimony of *two witnesses*, of apparently equal credit, E. and F. The probability of the truth of their united testimony depends on the values assignable to  $m$  and  $n$  in the expressions  $\frac{mp}{mp+np}$  and  $\frac{np}{m+np}$  in that note. Suppose, further, that the probability of the guilt of the accused, A., arising from the evidence of each of these witnesses taken singly, is to the contrary probability in the proportion of 1000: 1. The effect of this is to render  $m = 1000$ ,  $n = 1$ , and  $p = 2$ . Substituting these values in those expressions we shall have  $\frac{mp}{mp+np} = \frac{(1000)^2}{(1000)^2+1} + \frac{1000000}{1000001}$ ; and  $\frac{np}{m+np} = \frac{1}{1000001}$ ; or, the probability of truth is to that of error as a *million* to unity. Return now to the case of B., all the evidence against whom is purely circumstantial and presumptive. Instead of *two* witnesses to the fact, there are *twenty-four circumstances* adduced in evidence. The probability of guilt, resulting from each singly, to that of innocence, we will take as low as 2: 1. We then have  $m=2$ ,  $n=1$ , and  $p=24$ . Substituting these values as before, we get  $\frac{mp}{mp+np} = \frac{16777216}{16777216+1}$ , and  $\frac{np}{m+np} = \frac{1}{16777216+1}$ ; or the probability of his guilt is to that of his innocence in a proportion exceeding *sixteen millions* to unity. But instead of a large number of circumstances,

consistent with each other — a principle obvious in itself, and which will be further illustrated hereafter.<sup>1</sup>

*Presumption — original signification of — legal signification of.*

§ 299. The term “presumption,” in its largest and most comprehensive signification, may be defined, where, in the absence of actual certainty of the truth or falsehood \*of a fact or proposition, an inference, [ \* 409 ] affirmative or disaffirmative of that truth or falsehood, is drawn by a process of probable reasoning from something proved or taken for granted.<sup>2</sup> It is,

each giving a very slight degree of probability, let us suppose, what is far more usual in practice, the circumstances to be fewer in number and stronger in themselves. With this view we will assume  $m=10$ ,  $n=1$ , and  $p=8$ . Substituting these values in  $\frac{mp}{mp+np}$  and  $\frac{np}{mp+np}$ , these expressions will become  $\frac{100'000'000}{100'000'001}$  and  $\frac{1}{100'000'001}$ ; i. e., the probability of the guilt of the accused will be that of his innocence in the proportion of *one hundred millions* to unity. It will, of course, be understood that these numbers are only assumed for the purpose of illustration; but the above expressions clearly show, that, however high the credit of an eye-witness be taken, circumstances may so accumulate as to give a probability greater than any assignable.

<sup>1</sup> *Infra*, sect. 3, sub-sect. 2.

<sup>2</sup> “Præsumptio nihil est aliud, quàm argumentum verisimile, communi sensu perceptum ex eo, quod plerumque fit, aut fieri intelligitur.” Matthæus de Crimin. ad lib. 48 Dig. tit. 15, c. 6, N. 1. The definition of Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 14, is much the same—“Anticipatio judicii, de rebus incertis, ex eo, quod plerumque fit percepta.” See, also, Id. N. 3. “Est nihil aliud præsumptio quàm opinio ex probabili ratiocinatione concepta.” Vinnius, Jurispr. Contr. lib. 4, cap. 36. “Præsumptio est probatio negotii dubii ex probabilibus argumentis.” G. A. Struvius, Syntag. Jur. Civ. Exercit. 28, Art. XV. “Præsumptio est probatio per argumenta probabilia facta.” Westenbergius, Principia Juris, lib. 22, tit. 3, § 21. See, also, Id. § 4. “Præsumptio est collectio, seu illatio probabilis, ex argumentis per rerum circumstantias, frequenter evenientibus, conjiciens.” Strauchius, ad Univ. Jus. Privat., &c. Dissert. 25, Aphor. 33. Voet, Ad Pand. lib. 22, tit. 3, n. 14, says, presumptions are “Conjecturæ ex signo verisimili ad probandum assumptæ; vel opiniones de re incertâ, necdum penitus probatâ.” “On peut définir la présomption, un jugement que la loi ou l’homme porte sur la vérité d’une chose, par une con-

however, rarely employed \*in jurisprudence in this extended sense. Like “presumptive evi. [ \* 410 ]

séquence tirée d'une autre chose. Ces conséquences sont fondées sur ce qui arrive communément et ordinairement.” Pothier, *Traité des Obligations*, Part. 4, ch. 3, sect. 2, § 839. See, also, Bonnier, *Traité des Preuves*, § 635. “A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. \* \* \* In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected.” Per Abbott, C. J., in *R. v. Burdett*, 4 B. & A. 95, 161, 162. “Where the existence of one fact so necessarily and absolutely induces the supposition of another, that if the one is true, the other cannot be false, the term presumption cannot be legitimately applied.” 2 Ev. Poth. 329. See, also, Locke on the Human Understanding, B. 4, ch. 14, § 4. The following very different definition is, however, given in an able treatise on the Law of Evidence. “A *presumption* may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, a previous experience of the connection between the known and inferred facts is essential, of such a nature that, as soon as the existence of the one is established, admitted or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning on the subject. It also follows, from the above definition, that the inference may be either *certain* or not certain, but merely *probable*, and therefore capable of being rebutted by proof to the contrary. According to some writers, the term *presumption* is not strictly applicable where the inference is a necessary one, and absolutely conclusive, as where it is founded on the certain and invariable course of nature. \* \* \* Such a distinction appears, however, to be an unnecessary one; and it may well be doubted whether the distinction be founded on sound principles. The Roman lawyers used the term in the more extensive sense. Their *præsumptio juris et de jure* was conclusive.” 3 Stark. Ev. 927, 3rd Ed. With respect to this last observation, it is to be remarked that the *præsumptio juris et de jure* of the Roman law derived its conclusive effect, not from the supposed force of the inference, but because the law superadded something to its own presumption. That sort of presumption is defined both by Alciatus and Menochius, “*dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis.*” Alciatus, de Præs. Pars. 2, N. 3; Menochius, de Præs. lib. 1, quæst. 8, N. 1. “*Præsumptio juris et de jure,*” says Vinnius, Jurisp. Contract. lib. 4, cap. 36, “*dicitur, cum lex ipsa præsumit et simul disponit; si modò præsumptio, ac non potius juris quædam constitutio dicenda est.*” And the same may be said of the conclusive presumptions of our own law, in which “the rule of law merely attaches itself to the circumstances, when proved; it is not deduced from them. It is not a rule of inference from testimony; but a rule of protection, as expedient, and for the general good.”

[ \* 411 ] dence”<sup>1</sup> it has there obtained a restricted \*legal signification; and is used to designate an inference, affirmative or disaffirmative, of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning, from some matter of fact, either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the tribunal.<sup>2</sup> (a)

1 Greenl. Ev. § 32, 7th Ed. The use of presumption as a generic term, applicable to a certain as well as to contingent inferences, is indeed justified by the example of some other distinguished writers. (Menoch. de Præs. lib. 1, quæst. 3, &c.; quæst. 7, NN. 2 & 3; Titius, Jus Privat. lib. 2, c. 11, § 14, &c.); but their authority is overborne by those collected above, the number of which might easily be increased. Try the question by this test. Would it be correct to say that sexual intercourse is *presumed* from parturition; or that innocence is *presumed* from proof of an alibi? Nor does the quality above attributed to presumptions as their essential ingredient, namely, that the inference is made without any exercise of the reasoning faculties, rest on a much better foundation. The inferring one fact from another must ever be an act of reasoning, however rapid the process, or however obvious the inference; and although the law has in some cases added to particular facts an artificial weight beyond their natural tendency to produce belief, still many legal presumptions are only natural presumptions of fact recognized and enforced by law.

<sup>1</sup> See Introd. pt. 1, § 27, and *suprà*, § 294.

<sup>2</sup> See Domat, Lois Civiles, P. 1, liv. 3, tit. 6, Préamb. & sect. 4; 2 Ev. Poth. 332.

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(a) “Presumptions,” says Redfield, J., in *Marshall v. Aiken et al.*, 25 Vt. 326, “must always rest upon acknowledged or well-established facts, and *not upon presumptions*; and, to make a presumption for the basis or foundation of another presumption, that is, of payment, would be contrary to the acknowledged foundation, upon which all presumptions rest.” We have taken the liberty to reverse the order of the sentences in the above extract, for greater convenience in its quotation, but it does not in any measure injure the sense, or impair the force of the proposition of the learned judge. The fact announced by Judge Redfield, *suprà*, that presumptions can only be predicated upon well-established facts, or actual acknowledgments, or, as Pothier terms them, “confessions” of a party, is important to be remembered. It will be seen at once that, unless that upon which a presumption is predicated is well established, the presumption is too weak to serve as a guide to the truth, and that, in proportion to the absolute verity of the foundation, is the presumption strong or weak, and entitled to force.

In Gilbert on Ev., vol. 1, p. 309, the learned author says: “Every presump-

*Different meanings of.*

§ 300. But the English term "Presumption," as well as the Latin "Præsumptio," has been used by jurists and lawyers in several different senses. An attentive

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tion is more or less violent, according as the circumstances sworn are more or less strongly connected with the fact to be proved;" and he illustrates his proposition thus: "If a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword, this is a violent presumption that he is the murderer; for the blood, the weapon, the hasty flight, are all necessary concomitants to such horrid facts; and the next proof, to the sight of the fact itself, is the proof of those circumstances, *that do thus indicate the fact.*"

In *Brydges v. Duke of Chandos*, 2 Bur. 1065, Lord Mansfield said: "There can be no presumption of the nature of evidence in any case, without something from whence to make it, some ground to found the presumption upon," and, in the same case, Wilmut, J., said: "I can have no notion of a presumption without some facts or circumstances to found it upon. This would be inferring something seen, from something not seen. Length of time alone is nothing; the presumption must arise from some facts or circumstances arising within the time." Mr. Evans, in his excellent notes to Pothier on Obligations, vol. 2, page 338, says: "As a general incident to all presumptive evidence, it is requisite that it have a proper foundation, and not rest upon mere conjecture or surmise;" and further on, he says: "The facts from which a presumption is deduced must be such as are not merely consistent with the proposition which they are intended to establish; for evidence which leaves it indifferent whether a given supposition is or is not founded upon truth, is, in effect, no evidence at all; neither is a mere *preponderance* of probability sufficient to constitute a presumption; although the consistency of the fact confirms the assent to any actual uncontradicted testimony in support of it, in the first case, and the preponderance indicates the preference which *caeteris paribus* ought to be given in the second. A presumption can only be applied when the circumstances are such as to render the opposite supposition impossible."

Presumptions, being inferences deduced from facts, should be weighed with care, and applied with caution, where the facts upon which they are predicated are weak, or where the chain of facts, necessary to make the presumption absolutely clear, is not wholly complete. The facts in all cases should be such as lead to a clear and satisfactory conclusion, such as satisfy the mind to that degree of certainty that leaves little or no doubt of the correctness of the inference. Too much temerity should not be exhibited on the one hand, or too great timidity on the other, in a case where there is not absolute certainty, or rather where there is not the presence of all the circumstances requisite to make the inference complete. The mind should be satisfied either of the

examination of the subject will detect at least seven.

1. The original or primary sense stated in the preceding article. 2. The strict legal sense there explained. 3. A generic term including every sort of *rebuttable* presumption; *i. e.*, rebuttable presumptions of law, strong pre-

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truth or falsity of the inference from positive known arguments, and the inference, or rather the presumption, should not be destroyed, because the facts do not present *all* the links requisite to make the chain complete beyond a possible doubt.

Burlamqui, in his work on Natural Law, gives a very correct guide in matters of this character, "when," says he, "a truth is evinced by solid reasons, whatever can be brought against it ought not to stagger or weaken our convictions, *as long as they are such difficulties only as embarrass or puzzle the mind, without invalidating the proofs themselves.* There is," he continues, "a wide difference between seeing that a thing is absurd, and not knowing all that regards it; between an unanswerable question in relation to a truth and an unanswerable objection against it, though a great many confound these two sorts of difficulties; those only of the last order are able to prove that, what was taken for a known truth cannot be true, because some absurdity might arise. But the others prove nothing but the ignorance we are under in relation to several things, in relation to some known truth." A presumption being a deduction from a legitimate course of reasoning in reference to a given state of facts, should be allowed to operate in the determination of a question, in proportion to the force and strength of the inference in view of the facts from which it is drawn. If, as Burlamqui says, we find the "truth sufficiently evinced by *solid reasons*," we cannot resist their force, even though *some* doubt may possibly exist.

Mr. Evans, in his notes to Pothier, in commenting upon the degree of force to be given to presumptions, says, "when a series of facts, distinctly and unequivocally proved, manifestly tend to one conclusion, and another fact is proposed in contradiction to that conclusion, the mere inability to account for such opposite fact is not sufficient to destroy the inference to be deduced from the others, but the positive inconsistency should be clearly shown." Further on he says, "but it often requires great judgment and discretion to trace, with propriety, the connection with the existing circumstances, and the presumption which is applied to them; and there is no inquiry in which rapidity and precipitation may be more frequently detrimental \* \* \* and a presumption is not destroyed by the mere difficulty of accounting for some incidental circumstances, provided the other circumstances, not disputed, necessarily tend to the conclusion in dispute. On the other hand, a presumption is not to be hastily formed, from the difficulty of explaining the cause and reason of existing circumstances, *unless the whole of the subject with which those circumstances are connected is sufficiently seen.*"

sumptions of fact, mixed presumptions, or masses of evidence, direct or presumptive, which shift the burden of proof to the opposite party. It is only in this sense that the well-known maxim, "*Stabitur præsumptioni donec probetur in contrarium*," holds good. And here it will be necessary to advert to the language of L. C. B. Gilbert,<sup>1</sup> who says, that presumption is defined by the civilians, "*Conjectura ex certo signo proveniens, quæ alio (non) adducto pro veritate habetur*." This is far from correct—the above definition seems taken from a somewhat similar one given by Alciatus and Menochius of presumptions of *law*;<sup>2</sup> but is wholly inapplicable either to *præsumptiones juris et de jure*, whose very nature is to exclude \*all proof against what they assume as true, or to those presumptions of fact which are [ \* 412 ] too slight to shift the burden of proof. 4. A generic term applicable to certain as well as to contingent inferences.<sup>3</sup> 5. On the other hand, the word presumption has even been restricted to the sense of *irrebuttable* presumption.<sup>4</sup> 6. The popular sense of presumptuousness, arrogance, blind adventurous confidence, or unwarrantable assumption.<sup>5</sup> 7. The Latin "*præsumptio*" had, at

<sup>1</sup> Gilb. Evid. 156, 157, 4th Ed.

<sup>2</sup> Alciat. de Præs. Pars 3, N. 1; Menoch. de Præs. lib. 1, quæst. 8, N. 1.

<sup>3</sup> Menoch. de Præs. lib. 1, quæst. 3; & quæst. 7, NN. 2 & 3; Titius Jus Privat. lib. 2, c. 11, § 14, &c.; 3 Stark. Ev. 927, 3rd Ed.

<sup>4</sup> Grounds and Rudiments of Law, p. 186, 2nd Ed.; Branch, Max. p. 107, 5th Ed.; and Halkerston's Max. p. 79.

<sup>5</sup> Doct. & Stud. c. 26; Litt. R. 327; Hargr. Co. Litt. 155 b, note (5); 4 & 5 Will. & M. c. 23, s. 10; 1 Geo. 1, c. 13, s. 17, stat. 2; 19 Geo. 3, c. 56, s. 3; 11 Geo. 4 & 1 Will. 4, c. 23, s. 5; 6 & 7 Will. 4, c. 76, s. 8; 8 & 9 Vict. c. 87, s. 10. The Latin "*præsumptio*" is frequently used in this sense by Bracton (see fol. 1 b, §§ 7 and 8; 6 a, § 5; 221 b, § 2): as also by the civilians and canonists; Mascard. de Prob. quæst. 10, NN. 1, 5 & 6; Alciat. de Præs. Pars 2, N. 1, &c. See also the form of the commission of the peace, Dalt. Countr. Just. 16, 18; Archb. Justice of the Peace.

one time at least, another signification. In the *Leges Hen. 1, c. 10, § 1*, we find the expression "*Præsumpcio terre vel pecunie regis*," where "*præsumptio*" is used in the sense of "*invasio*," "*intrusio*," or "*usurpatio*."<sup>1</sup> Some others will be found in *Mascard. de Prob. quæst. 10*; and Müller's note *a* to *Struvius' Syntag. Jur. Civ. Exercit. 28, § XV*. The confusion necessarily consequent on so many meanings for the same word, joined to the great importance and natural difficulty of the subject of judicial presumptions, fully justify *Alciatus*<sup>2</sup> in speaking of it, as "*Materia valde utilis et quotidianâ in practicâ sed confusa, inextricabilis ferè*."(*a*)

<sup>1</sup> See the *Ancient Laws and Institutes of England*, A. D. 1840, Vol. 1, p. 519, note.(b), and Glossary.

<sup>2</sup> *Alciat. de Præs. P. 1, N. 1.*

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(*a*) The most satisfactory and clear definition of "presumptions" which I have been able to find is that given by *Pothier*, Part 4, Chap. 3, page 806. "Presumption," he says, "may be defined to be a judgment which the law, or which an individual makes, respecting the truth of one thing, by a consequence deduced from another thing. These consequences are founded upon what commonly and generally takes place; *presumptio, ex eo quod plerumque fit, cujac; in parat ad tit. cad. de probat. et præf.*

For instance, the law presumes that a debt has been paid when the creditor has returned the debtor his note, because a debtor does not commonly and ordinarily return the note to the debtor, until after payment. *Alciatus* says, that the term presumption is derived from *sumo* and *prae*, because *sumit pro vero habet pro vero*, it takes a thing to be true, *prae est ante aliunde probetur*.

Presumption differs from proof, properly so called; the latter attests a thing directly and of itself; presumption attests it by a consequence deduced from another thing. This may be illustrated by examples; the credit which is given to an act purporting to be an acquittance on the payment of a debt is a written proof of such payment; the credit which is given to the depositions of witnesses who have seen the creditor receive from the debtor the sum due to him is a parol proof of payment; for the acquittance and depositions, directly and in themselves, attest the fact of payment. But the evidence which acquittances for rent for the last three years afford of the rent of the preceding years having been paid, is a presumption, because these acquittances establish the fact, not directly, and in themselves, but by an infer-



*Explanation of certain expressions used by the civilians and canonists.*

§ 301. Before proceeding farther, it seems advisable to advert to certain expressions used by the civilians \*and canonists to indicate different kinds of proof, and the degrees of conviction resulting [ \* 413 ] from them, which, although in a great degree obsolete, are not undeserving of notice. These are, "Argumentum," "Indicium," "Signum," "Conjectura," "Suspicio," and "Adminiculum." The term "Argumentum" included every species of inference from indirect evidence, whether conclusive or presumptive.<sup>1</sup> "Indicium" — "Indice" in the French law — answers to that form of circumstantial evidence in ours where the inference is only presumptive, and was used to designate the fact giving rise to the inference rather than the inference itself. Under this head were ranked the recent possession of stolen goods, vicinity to the scene of crime, sudden change of life or circumstances, &c.<sup>2</sup> By "Signum" was meant indirect evidence coming under the cognizance of the senses: such as stains of blood on the person of a suspected murderer, indications of terror on being charged with an offense, &c.<sup>3</sup> "Conjectura" and "Suspicio" were not so

<sup>1</sup> See Matthæus de Crimin. ad lib. 48 Dig. tit. 15, cap. 6, N. 1; and Vinnius, Jurisp. Contr. lib. 4, cap. 25 & 36.

<sup>2</sup> Mascard. de Prob. lib. 1, quæst. 15; Menochius de Præs. lib. 1, quæst. 7; Encyclopédie Méthodique, tit. Jurisprudence, Art. Indices; Bonnier, Traité des Preuves, §§ 14 & 636.

<sup>3</sup> Quintil. Inst. Orat. lib. 5, c. 9; Menoch. de Præs. lib. 1, quæst. 7, NN. 31-37.

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*ence of the law, established upon the consideration of its being usual to pay the preceding rent, before the subsequent."*

This definition strikes me as being the most clear and forcible of any to be found in the books, and the illustration given of the principle at once impresses the principle upon the mind of the reader.

much modes of proof as expressions denoting the strength of the persuasion generated in the mind by evidence. The former is well defined, “*Rationabile vestigium latentis veritatis, unde nascitur opinio sapientis;*” or a slight degree of credence caused by evidence too weak or too remote to produce belief, or even suspicion. It is only in the character of “indicative” evidence that this has any place in English law.<sup>2</sup> “*Suspicio*” is a stronger term — “*Passio animi aliquid firmiter non eligentis.*”<sup>3</sup>

[ \* 414 ] *E. g.* A. B. is found murdered; \*and C. D., a man of bad character, is known to have had an interest in his death: this might give rise to a *conjecture* that he was the murderer; and if in addition to this he had, a short time before the murder, been seen near the spot where the body was found, the feeling in favor of his guilt might amount to *suspicion*. “*Adminiculum*,” as its etymon implies, meant any sort of evidence, which is useless if standing alone, but useful to corroborate other evidence.<sup>4</sup> These distinctions may appear subtleties to us, but for many reasons they were not without their use in the systems where they are found. The decision of all questions of law and fact was there intrusted to a single judge, one of the few limitations to whose power was, that the accused could not be put to the torture in the absence of a certain amount of evidence against him.<sup>5</sup>

<sup>1</sup> Mascard. de Prob. quæst. 14, N. 14.

<sup>2</sup> See bk. 1, pt. 1, § 93.

<sup>3</sup> Menochius de Præs. lib. 1, quæst. 8, N. 41.

<sup>4</sup> Menoch. de Præs. lib. 1, quæst. 7, NN. 57, 58, 59.

<sup>5</sup> Decret. Gratian. lib. 5, tit. 41, cap. 6; Matth. de Prob. cap. 2, N. 80.

*Division of the subject.*

§ 302. In dealing with this important subject, we propose to treat it in the following order:—

1. Presumptive evidence, presumptions generally, and fictions of law.
2. Presumptions of law and fact, and of mixed law and fact, usually met in practice.
3. Presumptions and presumptive evidence in criminal law.

## SECTION I.

PRESUMPTIVE EVIDENCE, PRESUMPTIONS GENERALLY, AND  
FICTIONS OF LAW.*Division.*

§ 303. It is clear that presumptive evidence, and the presumptions to which it gives rise, are not indebted for their probative force to positive law. When inferring \*the existence of a fact from others, courts of justice (assuming the inference properly drawn) [ \* 415 ] do nothing more than apply, under the sanction of the law, a process of reasoning which the mind of any intelligent being would have applied for itself under similar circumstances; and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action, the usages and habits of society, &c.<sup>1</sup> All such

<sup>1</sup> "The presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application." 1 Greenl. Ev. § 14, 7th Ed.

inferences are called by our lawyers "Presumptions of *fact*," or "Natural presumptions," and, by the civilians, "Præsumptiones hominis;"<sup>1</sup> in order to distinguish them from others of a technical kind, more or less of which are to be found in every system of jurisprudence, known by the name of "Presumptiones juris," or "Presumptions of *law*."<sup>2</sup> To these two classes may be added a third, which, as partaking in some degree of the nature of each of the former, may be called "Præsumptiones mixtæ," "*Mixed* presumptions," or "Presumptions of mixed law and fact." And as presumptions of fact are both unlimited in number, and from their very nature are not so strictly the object of legal science as presumptions of law,<sup>3</sup> we purpose, in accordance with the example of other writers on evidence, to deal with the latter first, together with the kindred subject of fictions of law. We shall then treat of the former, together with mixed presumptions; and the present section will conclude with a notice of conflicting presumptions.

<sup>1</sup> Mascardus de Prob. Conclus. 1226, however, restricts the expression 'naturæ præsumptio' to presumptions derived from the ordinary course of nature.

<sup>2</sup> See Introd. pt. 2, §§ 42 & 43.

<sup>3</sup> Phil. & Am. Ev. 457.

[ \* 416 ]

## \* SUB-SECTION I.

## PRESUMPTIONS OF LAW, AND FICTIONS OF LAW.

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*Presumptions of law.*

§ 304. Presumptions, or, as they are also called, "Intendments" of law, and by the civilians, "Præsumptiones seu positiones juris," are inferences or positions established by law, common or statute; and have been shown, in the Introduction to this work,<sup>1</sup> for reasons which it is unnecessary here to repeat, to be indispensable to every well-regulated system of jurisprudence. They differ from presumptions of fact and mixed presumptions in two most important respects. 1st, that in the latter a discretion, more or less extensive, as to drawing the inference is vested in the tribunal, while in those now under consideration the

<sup>1</sup> Introd. pt. 2, §§ 42 & 43.

law peremptorily requires a certain inference to be made, whenever the \*facts appear which it assumes as [ \*417 ] the basis of that inference. If, therefore, a judge direct a jury contrary to a presumption of law, a new trial is grantable *ex debito justitiæ*;<sup>1</sup> and if a jury, or even a succession of juries, disregard such a presumption, new trials will be granted, *toties quoties*, as matter of right.<sup>2</sup>(a) But when any other species of presumption is overlooked or disregarded, the granting of a new trial is matter for the discretion of the court, which will be more or less liberal in this respect according to the nature and strength of the presumption. 2nd (and here

<sup>1</sup> Phil. & Am. Ev. 464; *Haire v. Wilson*, 9 B. & C. 643.

<sup>2</sup> Phil. & Am. Ev. 459; 1 Ph. Ev. 467, 10th Ed.; *Tindal v. Brown*, 1 T. R. 167-171.

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(a) The case of *Tindal v. Brown* is hardly an authority for the proposition laid down by the author, as in that case the question of presumption did not arise at all. The question turned entirely upon the sufficiency of notice of non-payment, by a holder to an indorser of a note. Yet there can be no question of the entire soundness of the proposition. Where a presumption exists, which is not overcome, the jury are bound to give it force and effect, and if they disregard it, there is no question but that a court would set aside their verdict. A presumption has all the force of positive proof until it is overcome; hence it cannot be disregarded either by a jury or any other tribunal sitting to determine issues of fact. But if there is *any* evidence, tending to rebut the presumption, the jury are to weigh that also, and if, in their judgment, it fairly overcomes the presumption, their verdict, for that cause, will not be disturbed. In *Crane v. Morris*, 6 Pet. (U. S.) 598, the court say "presumptive or *prima facie* evidence of a fact is such evidence as in judgment of law is sufficient to establish the fact, if not rebutted. *The jury are bound to consider it in that light, and the court will set aside their verdict and grant a new trial, if without rebutting evidence they disregard it. In a legal sense prima facie evidence, in the absence of controlling circumstances, becomes conclusive*, that is, it should operate upon the minds of the jury as decisive of the fact upon which their verdict is to be founded."

See also *Cutting v. Gilders*, 3 Ala. 536; *The Jane v. The United States*, 7 Cranch (U. S.), 363; *United States v. Wiggins*, 14 Pet. (U. S.) 334; *Kelly v. Gage*, 6 id. 622. But the evidence must be such as to fairly raise a presumption, or the jury may disregard it. *Bank of United States v. Corcoran*, 2 Pet. (U. S.) 121.

it is that the difference between the several kinds of presumptions is so strongly marked), as presumptions of law are, in reality, rules of law, and part of the law itself, the court may draw the inference whenever the requisite facts are developed in pleading, &c.;<sup>1</sup> while all other presumptions, however obvious, being inferences of fact, cannot be made without the intervention of a jury.

*Grounds of.*

§ 305. The grounds of these præsumptiones juris are various. Some of them are natural presumptions which the law simply recognizes and enforces. Thus, the legal maxim that every one must be presumed to intend the natural consequence of his own act:<sup>2</sup> and, therefore, that he who sets fire to a building intended injury to its owner; and that he who lays poison for, or discharges loaded arms at another, intended death or bodily harm to that person; merely establishes as law a principle to which the reason of man at once assents. But in most of the presumptions which we are now considering, the inference is only *partially* approved by reason, the law, from motives of policy, attaching to the facts which give \* rise to it an artificial effect beyond their natural tendency to produce belief. Thus, although [\* 418] a receipt for money under hand and seal naturally gives rise to a presumption of payment, still it does not *necessarily* prove it; and the conclusive effect of such a receipt is a creature of the law.<sup>3</sup> So, the maxim by which a party who kills another is presumed to have done it maliciously, seems to rest partly on natural equity

<sup>1</sup> Steph. Plead. 391-392, 5th Ed.; 1 Chitty, Plead. 221, 6th Ed.

<sup>2</sup> 3 M. & Selw. 15; 9 B. & C. 645; *R. v. Sheppard*, R. & R. C. C. 169; *R. v. Farrington*, Id. 207.

<sup>3</sup> Gilb. Ev. 158, 4th Ed.

and partly on policy. To these may be added a third class, in which the principle of legal expediency is carried so far, as to establish inferences not perceptible to reason at all, and perhaps even repugnant to it. Thus, when the law punishes offenses, even *mala prohibita*, on the assumption that all persons in the kingdom, whether natives, or foreigners, are acquainted with the common and general statute law, it manifestly assumes that which has no real existence whatever, though the arbitrary inference may be dictated by the soundest policy.

*Irrebuttable presumptions of law, or præsumptiones juris et de jure.*

§ 306. A very important distinction exists among presumptions of law,—namely, that some are absolute and conclusive, called by the common lawyers *Irrebuttable presumptions*, and by the civilians *Præsumptiones juris et de jure*; while others are conditional, inconclusive, or *rebuttable*, and are called by the civilians *Præsumptiones juris tantum*, or simply *Præsumptiones juris*. The former kind of presumption has been most accurately defined by the civilians, “*Dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis.*” They add “*Præsumptio juris dicitur, quia lege introducta est; et de jure, quia super tali præsumptione lex inducit firmum jus, et habet eam pro veritate.*”<sup>1</sup> In a word, they are inferences which the law makes so peremptorily, that it will not allow them to be overturned by any contrary proof, however strong. (a)

<sup>1</sup> Alciatus de Præs. Pars 2, N. 3; Menochius de Præs. lib. 1, quæst. 3, N. 17; Poth. Obl. § 807.

(a) “*Presumptions juris et de jure*” says Pothier, p. 4, chap. 3, sec. 1, “are those which are such absolute proofs as to exclude all evidence to the contrary. Alciatus defines presumption, *juris et de jure*, as follows. “*Est dispositio legis*



\* Thus, where a cause has once been regularly adjudicated upon by a competent tribunal, [ \*419 ] from which there is no appeal, the whole matter assumes the form of *res judicata*; and evidence will not be admitted, in subsequent proceedings between the same parties, to show that decision erroneous.<sup>1</sup> An infant under the age of seven years is not only presumed incapable of committing felony, but the presumption cannot be rebutted by the clearest evidence of a mischievous discretion.<sup>2</sup> So, a bond or other specialty is presumed to have been executed for good consideration, and no proof can be admitted to the contrary,<sup>3</sup> unless the instrument is impeached for fraud.<sup>4</sup> A receipt under hand

<sup>1</sup> See *infra*, ch. 9.

<sup>2</sup> 1 Hale, P. C. 27-8; 4 Blackst. Comm. 23.

<sup>3</sup> Plowd. 308-9; 2 Stark. Ev. 930, 3rd Ed; Id. 747, 4th Ed.

<sup>4</sup> Stark. in loc. cit. See bk. 2, pt. 3, § 220.

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*aliquid præsumentis et super præsumpto tanquam sibi comperto statuentis.*" "It is," says Menochius, Tr. De. Pref. L. 1, 9, 3, "called *præsumptio juris*, because a *lege introducta est, et de jure quia super tali præsumptione lex inducit fir- mum jus, et habet eam pro veritate.*"

These presumptions *juris et de jure* amount to more than written or parol proof, or even than confession. Written, as well as parol proof may be over- turned by proof to the contrary; it does not preclude the person against whom it bears, from being allowed to offer contradictory proof, if he can. For instance, if a man claiming from me a hundred livres, which he alleges him- self to have lent me, produces an obligation before a notary, by which I ac- knowledge the loan; the written evidence arising from this obligation may be destroyed, by an opposite proof which I am not precluded from making, if I can, as by producing a counter letter, acknowledging that I have not received the sum named in the obligation.

It is the same with respect to confessions, though made *in jure*. We have seen, in the preceding section, that the proof which results from these may be destroyed by opposite proof, of its having been made by mistake.

On the contrary, presumptions *juris et de jure* cannot be destroyed; and the party against whom they operate is not admitted to prove any thing in opposition to them. The principal kind of presumption, *juris et de jure*, is that which is founded on the authority of *res judicata*."

and seal is conclusive evidence of the payment of money;'<sup>1</sup>(a) and in the time of the old feudal tenures it was an irrebuttable presumption of law, that a person under the age of twenty-one was incapable of performing knight service.<sup>2</sup>

*Number of.*

§ 307. These conclusive presumptions have varied considerably in the course of our legal history. Certain presumptions, which in earlier times were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among præsumptiones juris tantum, or considered as presumptions of fact to be made at the discretion of a jury.<sup>3</sup> On the whole, modern courts of justice are slow to recognize presumptions as irrebuttable, and disposed rather to restrict them to extend their number. To preclude a party by an arbitrary rule from adducing evidence which, if received, would compel a  
[ \*420 ] \*decision in his favor, is an act which can only be justified by the clearest expediency and soundest policy; and some presumptions of this class ought never to have found their way into it.

<sup>1</sup> Gilb. Ev. 158, 4th Ed.

<sup>2</sup> Litt. sect. 103; Co. Litt, 78 b.

<sup>3</sup> Ph. & Am. Ev. 460; 1 Phil. Ev. 469, 10th Ed.

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(a) Any receipt is evidence *prima facie*, of the payment of money, if such is its purport. Even a receipt under seal has been held to be open to explanation by parol, and parol evidence has been admitted to exclude an item from its operation that was clearly embraced in the terms of the receipt. That is, parol evidence has been held admissible to show what the real intention of the parties to the receipt is, and that it was to have a narrower and more limited operation than its terms indicated; *Jones v. Ward*, 10 Yerg. (Tenn.) 160; but generally the rule is otherwise, and, if an actual mistake has been made in the terms of the instrument, proceedings to reform it should be had; *State v. Messick*, 1 Houst. (Del.) 347.

*Use of.*

§ 308. *Præsumptiones juris et de jure* are not, however, without their use. On the contrary, when restrained within due limits, they exercise a very salutary effect in the administration of justice, by throwing obstacles in the way of vexatious litigation, and repressing inquiries where sound and unsuspected evidence is not likely to be obtained. Among the most useful in these respects, may be ranked the principle which upholds the authority of *res judicata*, the intendments made by the courts to support the verdicts of juries, and, as expounded in modern times, the doctrine of estoppel.

*Fictions of law.*

§ 309. "Fictions of law" are closely allied to irrefutable presumptions of law. "*Fictio est legis, adversus veritatem, in re possibili, ex justâ causâ, dispositio:*"<sup>1</sup> in other words, where the law, for the advancement of justice, assumes as fact, and will not allow to be disproved, something which is false, but not impossible. The difference between fictions of law and *præsumptiones jures et de jure* consists in this, that the latter are arbitrary inferences which may or may not be true; while in the case of fictions, the falsehood of the fact assumed is understood and avowed." "*Super falso et certo fingitur super incerto et vero præsumitur.*"<sup>2</sup> Thus

<sup>1</sup> Gothofred. Not. 3. ad lib. 22 Dig. tit. 3; Westenbergius, *Principia Juris*, ad lib. 22 Dig. tit. 3, § 28; Huberus, *Positiones Juris*, ad lib. 22 Dig. tit. 3, N. 25; Menochius de *Præs.* lib. 1, quæst. 8; 3 Blackst. Comm. 43, note (b). See also 2 Rol. 502, and Palm. 354.

<sup>2</sup> Huberus, *Præl. Jur. Civ.* lib. 22, tit. 3, N. 21; Voet. ad *Pand.* lib. 22, tit. 3, N. 19; Alciatus de *Præs. Pars.* 1, N. 4.

<sup>3</sup> Gothof. Not. (3) ad Lib. 22 Dig. tit. 3.

the *præsumptio juris et de jure* that infants under the  
 [ \* 421 ] \*age of seven years are *doli incapaces* for felonious purposes,<sup>1</sup> is probably true in general, though false in particular instances; but when, in order to give jurisdiction to the courts at Westminster, the law used to feign that a contract which was really entered into at sea was made in some part of England,<sup>2</sup> the assumption was avowedly false, and a fiction in the completest sense of the word.

*Use of — Rules respecting.*

§ 310. Fictions of law, as justly observed by Mr. Justice Blackstone,<sup>3</sup> though they may startle at first, will be found on consideration to be highly beneficial and useful. Like artificial presumptions, however, they have also their abuse; for we sometimes find them introduced into the jurisprudence of a country without adequate cause, or retained in it after their utility has ceased. They are invented, say the civilians, “*ad conciliandam æquitatem cum ratione et subtilitate juris*;”<sup>4</sup> and it is a well-known maxim of the common law, “*in fictione juris semper subsistit æquitas*;”<sup>5</sup> in furtherance of which principle the two following rules have been laid down.

*1st. Must not prejudice innocent parties.*

§ 311. First, fictions are only to be made for necessity, and to avoid mischief,<sup>6</sup> and, consequently, they must never be allowed to work prejudice or injury to an

<sup>1</sup> 1 Hale, P. C. 27, 28; 4 Blackst. Comm. 23.

<sup>2</sup> 3 Blackst. Comm. 107; 4 Inst. 134.

<sup>3</sup> 3 Blackst. Comm. 43.

<sup>4</sup> Voet. ad Pand. lib. 22, tit. 3, N. 19.

<sup>5</sup> 3 Blackst. Comm. 43; Co. Litt. 150 a; 10 Co. 40 a; 11 Co. 51 a.

<sup>6</sup> 3 Co. 30 a, *Butler and Baker's case*.

innocent party :<sup>1</sup> "Fictio juris non operatur damnum vel injuriam."<sup>2</sup> Thus, when a man seized in fee of lands marries, and makes a feoffment to another, who grants a rent-charge out of it to the feoffor and his wife, \*and to the heirs of the feoffor, the feoffor dies, and his wife recovers the moiety of the land [ \* 422 ] for her dower by custom, she may distrain but for half of the rent-charge; for although, by fiction of law, her claim of dower is above the rent, yet, if that fiction were carried so far as to allow her to distrain for the whole rent, it would work a wrong to a third person, which the law will not allow.<sup>3</sup> So, although the vouchee in a common recovery was, by fiction of law, considered tenant of the land so far as to enable him to levy a fine to the demandant, or to accept a fine or release from him; still, as the vouchee had really nothing in the land, a fine by him to a stranger, or a fine or release to him from a stranger, was void.<sup>4</sup>

2nd. *Must have a possible subject-matter.*

§ 312. Secondly, it is said to be a rule that the matter assumed as true must be something physically possible.

<sup>1</sup> Id. 29; 11 Co. 51 a; 13 Co. 21 a.

<sup>2</sup> Palm. 354. See also 3 Co. 36 a; 2 Rol. 502; 9 Exch. 45.

<sup>3</sup> Co. Litt. 150 a.

<sup>4</sup> Id. 265 b; 3 Co. 29 b.

<sup>5</sup> Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 22; Alciatus, de Præs. Pars 1, N. 5; Devot. Inst. Canon. lib. 3, tit. 9, § 28, not. 2, 5th Ed. "Chescun fiction doit estre *ex re possibili*; ceo ne serra d'impossible, car le ley imitate nature;" per Doddridge, J., in *Sheffield v. Ratchiffe*, 2 Rol. 501. The existence of this rule has been denied, and especially by Titius (Jus. Privatum, &c., lib. 1, cap. 9, §§ 1 & 13), who says of fictions in general, "totus iste fictionum apparatus, non tantum non necessarius, sed inutilis ineptusque;" and he adduces, as instances of feigned impossibilities, the 26th Constitution of the Emperor Leo, entitled, "ut eunuchi adoptare possint;" and also the fact, that a child in ventre sa mère is susceptible of many rights, just as if it had been actually born. In the latter of these cases, however, the fiction involves no impossi-

“Lex non intendit aliquid impossibile.”<sup>1</sup> “Lex non cogit ad impossibilia.”<sup>2</sup> “Nulla impossibilia sunt præsumenda.”<sup>3</sup> Thus, says Huberus, \*where a man [ \* 423 ] devises his property, on condition that the devisee shall do a certain act within a limited time after the death of the devisor; until that time has expired with the condition unperformed, the deceased cannot be said to have died intestate; because the condition, when performed, has a retrospective effect to the time of the death. But if the limited time be allowed to elapse with the condition unperformed, no subsequent performance of it can have relation back to the day of the death; for this would involve the absurdity of a man who had already died intestate being deemed to have died testate at a time subsequent to his decease.<sup>4</sup>

*Kinds of*—1. *Affirmative*—2. *Negative*—3. *Of relation; to persons; to things; to place; to time.*

§ 313. Fictions of law are of three kinds: affirmative or positive fictions, negative fictions, and fictions of relation.<sup>5</sup> In the case of affirmative fictions something is assumed to exist which in reality does not; such as the

bility, its only operation being with relation to time; and with respect to the former, it is clear from the preamble of the constitution in question, that the right to adopt given to the persons in the condition there mentioned, was conferred on them as an indulgence, without any reference to a supposed power of procreation.

<sup>1</sup> 12 Co. 89.

<sup>2</sup> Co. Litt. 92 a, 231 b, 9 Co. 73 a; Hob. 96.

<sup>3</sup> Co. Litt. 78 b.

<sup>4</sup> Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 22.

<sup>5</sup> “Tres constitui solent species. 1. *Affirmativa*, *Positiva*, seu *Inductiva*, qua aliquid ponitur seu inducitur, quod non est. 2. *Negativa* seu *Privativa*, qua id, quod revera est, fingitur, ac si non esset. 3. *Translativa*, qua id, quod est in uno, transfertur in aliud.” Westenbergius, Principia Juris, lib. 22, tit. 3, § 29.

fiction of lease, entry, and ouster, in actions of ejectment, previous to the 15 & 16 Vict. c. 76; the old fiction that the plaintiff in all suits on the law side of the Exchequer was accountant to the Crown;<sup>1</sup> and the *ac etiam* clause in writs, by means of which the Court of Queen's Bench preserved its jurisdiction over matters of debt after the passing of 13 Car. 2, c. 2, st. 2,<sup>2</sup> &c. In negative fictions, on the contrary, that which really exists is treated as if it did not. Thus a disseizee, after his re-entry, may maintain trespass for injury done to the freehold during his disseizin, on the principle that, so far as the disseizor and his servants are concerned, the freehold must be taken never to \*have been divested out of the disseizee.<sup>3</sup> Fictions of relation are of four [ \* 424 ] kinds:<sup>4</sup>—First, where the act of one person is taken to be the act of another; as where the act or possession of a servant is deemed the act or possession of his master. So, where a felonious act is done by one person in the presence of others who are aiding or abetting him, the act of that one is, in contemplation of law, the act of all.<sup>5</sup> “Qui per alium facit, per seipsum facere videtur.”<sup>6</sup> Second, where an act done by or to one thing is taken, by relation, as done by or to another; as where the possession of land is transferred by livery of seizin, or a mortgage of land is created by delivery of the title-deeds. Third, fictions as to place; as, in the case already put,

<sup>1</sup> 3 Blackst. Comm. 46.

<sup>2</sup> Id. 287, 288.

<sup>3</sup> 11 Co. 51 a, *Liford's case*. See also *Barnett v. The Earl of Guildford*, 11 Exch. 19.

<sup>4</sup> “Translatio fit. 1. *A personā in personam*. 2. *De re ad rem*. 3. *De loco ad locum*. 4. *De tempore ad tempus*.” Westenbergius, *Principia Juris*, lib. 22, tit. 3, § 30.

<sup>5</sup> 1 Hale, P. C. 437.

<sup>6</sup> Co. Litt. 258 a. See Dig. lib. 43, tit. 16, l. 1, § 12.

of a contract made at sea, or abroad, being treated as if made in England, and the like.<sup>1</sup> There is a curious instance of this kind of fiction in the civil law, by which Roman citizens, who were made prisoners by an enemy, were on their return home supposed never to have been prisoners at all, and were entitled to civil rights as if they had not been out of their own country.<sup>2</sup> Fourth (and lastly), fictions as to time. Thus, where a feoffment was made with livery of seizin, a subsequent attornment by the tenant was held to relate back to the time of the livery.<sup>3</sup> It is on this principle that the title of an executor or administrator to the goods of the testator or intestate relates back to the time of his death, and does not take effect merely from the probate, or grant of the letters of administration,<sup>4</sup> \* an [ \* 425 ] extremely useful fiction, to prevent the property of the deceased being made away with. And it is a fixed principle that ratification has relation back to the time of the act done,—“*Omnis rati habitio retrotrahitur et mandato æquiparatur*,”<sup>5</sup> a maxim, which has been well explained in some modern cases,<sup>6</sup> and was also known in the Roman law.<sup>7</sup> This kind of fiction is also largely to be found in the procedure of the courts, where it is every

<sup>1</sup> 3 Blackst. Comm. 107.

<sup>2</sup> Dig. lib. 49, tit. 15, l. 12, § 6.

<sup>3</sup> 3 Co. 29 a.

<sup>4</sup> See the cases on this subject collected in *Tharpe v. Stallwood*, 5 Mann. & Gr. 760; also *Foster v. Bates*, 12 M. & W. 226, *Morgan v. Thomas*, 8 Exch. 302, and *Barnett v. The Earl of Guildford*, 11 Exch. 19.

<sup>5</sup> Co. Litt. 180 b, 207 a, 245 a, 258 a; 9 Co. 106 a; 4 Inst. 317; 1 Wms. Saund. 264 b, note (e), 6th Ed.; 3 B. Moore, 619; 6 Scott, N. R. 896; 2 Exch. 185 and 188; 4 Id. 790, 798; 7 H. & N. 693.

<sup>6</sup> *Wilson v. Tummon*, 6 Scott, N. R. 894, 6 Man. & Gr. 236; *Bird v. Brown*, 4 Exch. 786; *Buron v. Denman*, 2 Exch. 167; *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Mo. P. C. C. 22.

<sup>7</sup> Dig. lib. 46, tit. 3, l. 12, § 4; lib. 43, tit. 16, l. 1, § 14; lib. 3, tit. 5, l. 6, § 9; Cod. lib. 4, tit. 28, l. 7.



day's practice to deliver pleadings, sign judgments, and do many other acts, *nunc pro tunc*.<sup>1</sup>

*Rebuttable presumptions of law, or Præsumptiones juris tantum.*

§ 314. The other kind of presumptions of law, which we have called Rebuttable presumptions, or *Præsumptiones juris tantum*, has been thus correctly defined by one of the civilians, "*Præsumptio juris dicitur, quæ ex legibus introducta est, ac pro veritate habetur; donec probatione aut præsumptione contrariâ fortiore enervata fuerit.*"<sup>2</sup> Every word of this sentence is worthy of attention. First, like the former class, these presumptions are intendments made by law; but, unlike them, they only hold good until disproved. Thus, although the \* law presumes all bills of exchange and promissory notes to have been given and indorsed [ \* 426 ] for good consideration, it is competent for certain parties affected by these presumptions to falsify them by evidence.<sup>3</sup> So, the legitimacy of a child born during wedlock may be rebutted by proof of the absence of the opportunity for sexual intercourse between its supposed parents.<sup>3</sup> So, while the law præsumes every infant between the ages of seven and fourteen to be incapable of committing felony, as being *doli incapax*, still a mischievous discretion may be shown; for, *malitia supplet ætatem*.<sup>5</sup> And there are many instances of children

<sup>1</sup> See further, on the subject of fictions generally, Finch, Law, 66; and on fictions by relation, *Butler and Baker's case*, 3 Co. 25 a, and 2 Roll. Abr. tit. Relation, and Trespass per Relation.

<sup>2</sup> Voet. ad Pand. lib. 22, tit. 3, N. 15. Another civilian, more ancient, defines a presumption of law, "*Animi legislatoris ad verisimile applicatio, onus probandi transferens.*" Baldus, in Rubr. Cod. de Probat. N. 8.

<sup>3</sup> 3 Stark. Ev. 930, 3rd Ed.; Id. 747, 4th Ed.; Byles on Bills, ch. 10, 8th Ed.

<sup>4</sup> See on this subject, *infra*, sect. 2, sub-sect. 3.

<sup>5</sup> 1 Hale, P. C. 26; 4 Blackst. Comm. 23; 12 Ass. pl. 30.

under the age of fourteen being punished capitally. To this class also belong the well-known presumptions in favor of innocence, and sanity, and against fraud, &c.; the presumption that legal acts have been performed with the solemnities required by law, that every person discharges the duties or obligations which the law casts upon him,' &c. The concluding words of the definition of this species of presumptions show that they may be rebutted by presumptive as well as by direct evidence, and that the weaker presumption will give place to the stronger.<sup>2</sup>

[ \* 427 ]

## \* SUB-SECTION II.

## PRESUMPTIONS OF FACT, AND MIXED PRESUMPTIONS.

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<sup>1</sup> *Infra*, sect. 2, sub-sect. 3 and 4.<sup>2</sup> *Infra*, sub-sect. 3.

*Presumptions of fact.*

§ 315. We now return to a more particular examination of Præsumptiones hominis, or Presumptions of fact; in treating of which it is proposed to consider, 1st. The grounds or sources whence they are derived; 2nd. Their probative force. We shall then briefly explain the nature of Præsumptiones mixtæ, or Presumptions of mixed law and fact; and, lastly, show the extent to which the discretion of juries in drawing presumptive \* inferences is controlled or reviewed [ \* 428 ] by courts of law.

*Grounds and sources of — Presumptions relating to things — to persons — to the acts and thoughts of intelligent agents.*

§ 316. The grounds or sources of presumptions of fact are obviously innumerable — they are co-extensive with the facts, both physical and psychological, which may, under any circumstances whatever, become evidentiary in courts of justice:¹ — but, in a general view, such presumptions may be said to relate to *things*, *persons*, and the *acts and thoughts* of intelligent agents.² With respect to the first of these, it is an established principle that conformity with the ordinary course of nature ought always to be presumed. Thus, the order and changes of the seasons; the rising, setting, and course of the heavenly bodies, and the known properties of matter, give rise to very important presumptions relative

¹ “Desumitur [præsumptio] ex personis, ex causis, ex loco, ex tempore, ex qualitate, ex silentio, ex familiaritate, ex fugâ, ex negligentia, ex viciniâ, ex obscuritate, ex eventu, ex dignitate, ex ætate, ex quantitate, ex amore, ex societate, &c.” Matthæus de Probationibus, c. 2, n. 1.

² Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17.

to physical facts, or things. The same rule extends to persons. Thus, the absence of those natural qualities, powers and faculties which are incident to the human race in general, will never be presumed in any individual; such as the impossibility of living long without food, the power of procreation within the usual ages, the possession of the reasoning faculties, the common and ordinary understanding of man, &c.<sup>1</sup> To this head are reducible the presumptions which juries are sometimes called on to make relative to the duration of human life, the time of gestation, &c. Under the third class, namely, the acts and thoughts of intelligent agents, come, among others, all psychological facts; and here most important inferences are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature. Thus, no man \*will ever be presumed [ \* 429 ] to throw away his property, as, for instance, by paying money not due;\* and it is a maxim, that every one must be taken to love his own offspring more than that of another person, &c.<sup>2</sup> Many presumptions of this kind are founded on the customs and habits of society; as, for instance, that a man to whom several sums of money are owing by another will call in the debts of longest standing first, &c.<sup>3</sup> Nor is this confined to the human race, for similar presumptions may be derived from the instincts of animals.<sup>4</sup>

<sup>1</sup> Id.

<sup>2</sup> Voet. ad Pand. lib. 22, tit. 3, n. 15; Dig. lib. 22, tit. 3, l. 25.

<sup>3</sup> Co. Litt. 373 a. See also 2 Inst. 564.

<sup>4</sup> Gilb. Ev. 157-158, 4th Ed.; 1 Ev. Poth. § 812; Cod. lib. 10, tit. 22, l. 3.

<sup>5</sup> Huber. Præl. Jur. Civ. lib. 22, tit. 3, N. 16; Goodeve, Evid. 52.

2. *Probative force of presumptive evidence — Division of presumptions of fact into violent, probable, and light.*

§ 317. 2. The vast field over which presumptive reasoning extends must render ineffectual any attempt to reduce into definite classes the presumptions to which it gives rise, according to their degree of probative force. Some classification, however, has generally been deemed convenient,<sup>1</sup> and there is one which, on the strength of certain high authorities, seems to have become embodied into our law of evidence. "Many times," says Sir Edward Coke,<sup>2</sup> "juries, together with other matter, are much induced by presumptions; whereof there be three sorts, viz., violent, probable, and light or temerary. *Violenta præsumptio* is many times *plena probatio*; *præsumptio probabilis* moveth little; but *præsumptio levis seu temeraria* moveth not at all." "Præsumptio violenta valet in lege."<sup>3</sup> As an instance of *violenta præsumptio*, amounting to *plena probatio*, Sir Edward Coke,<sup>4</sup> and in this he is followed \* by several other eminent authors,<sup>5</sup> puts the case of one being run [ \* 430 ] through the body with a sword in a house, who instantly dies of that wound; and then another man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. "This," observes Chief Baron Gilbert,<sup>6</sup> "is a violent presumption

<sup>1</sup> A large number, taken from the works of the earlier civilians, are collected by Menochius, de Præs. lib. 1, quæst. 2.

<sup>2</sup> Co. Litt. 6 b.

<sup>3</sup> Jenk. Cent. 2, Cas. 3.

<sup>4</sup> Co. Litt. 6 b.

<sup>5</sup> 2 Hawk. P. C. c. 46, s. 42; 1 Stark. Ev. 562, 3rd Ed.; Id. 843, 4th Ed.; Gilb. Evid. 157, 4th Ed., &c. See also note (f), p. 431.

<sup>6</sup> Gilb. Evid. in loc. cit.

that he is the murderer ; for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts ; and the next proof to the sight of the fact itself is the proof of those circumstances that do necessarily attend such fact." Notwithstanding the weight of authority in its favor, this illustration of violent presumption has been made the subject of much and deserved observation. If the authors just quoted mean to say, as their words imply, that there is no possible mode of reconciling the above facts with the innocence of the man seen coming out of the house, the proposition is monstrous ! Any of the following hypotheses will reconcile them, and probably others might be suggested. First, that the deceased, with the intention of committing suicide, plunged the sword into his own body ; and that the accused, not being in time to prevent him, drew out the sword, and so ran out, through confusion of mind, for surgical assistance.<sup>1</sup> Second, that the deceased and the accused both wore swords ; that the deceased, in a fit of passion, attacked the accused ; and that the accused, being close to the wall, had no retreat, and had just time enough to draw his sword, in hope of keeping off the deceased, who, not seeing the sword in time, ran upon it and so was killed.<sup>2</sup> Third, that the deceased may in fact have been murdered, and that the real murderer may [ \* 431 ] \*have escaped, leaving a sword sticking in or lying near the body, and the accused coming in may have seized the sword and run out to give the alarm.<sup>3</sup> Fourth, that the sword may have been originally used in an attack by the accused on the deceased, and wrenched

<sup>1</sup> 3 Benth. Jud. Ev. 236 ; Burnett's Crim. Law. Scotl. 508.

<sup>2</sup> 3 Benth. Jud. Ev. 236, 237.

<sup>3</sup> Goodeve, Evid. 32.

from, and afterward turned against the deceased by the accused, under danger of attack on his life by pistol or otherwise.<sup>1</sup> Perhaps, however, Sir Edward Coke and Chief Baron Gilbert only meant that the above facts would constitute a sufficient *prima facie* case to call on the accused for his defense, and, in the absence of explanation by him, would warrant the jury in declaring him guilty.<sup>2</sup>

*Doubtful utility of.*

§ 318. The utility of the classification of presumptions of fact into violent, probable and light is questionable ;\* but if thought desirable to retain it, the following good illustration is added from a well-known work on criminal law. "Upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards \*from the outer door, with the stolen goods in [ \* 432 ] his possession, it would be a violent presumption of his having stolen them; but if they were found

<sup>1</sup> Id.

<sup>2</sup> Their language seems to have been so understood by Mounteney, B., in the case of *Annesley v. The Earl of Anglesea*, 17 Ho. St. Tr. 1430. Mr. Starkie, however, says that the circumstances wholly and necessarily exclude any but one hypothesis. 1 Stark. Ev. 562, 3rd Ed.; Id. 844, 4th Ed. The illustration given by Sir Edward Coke of a violent presumption is very ancient, and seems to have been a favorite both among the early civilians and the common-law lawyers. The facts stated in the text are expressly adduced by Bartolus, in the 14th century, and other writers of that and subsequent periods, as conclusive proof of murder (Bartolus, Comment. in 2dam partem Dig. Novi. de Furtis, 121 a, Ed. Lugd. 1547); and they were deemed, in our own law, sufficient to support a counterplea to a wager of battle, and thus oust the appellee of his right to invoke the judgment of heaven. Staundf. P. C. lib. 3, c. 15, Counterpleas al Battaile; Bracton, lib. 3, fol. 137. See also Britton. fol. 14. Their inconclusiveness, however, did not escape the notice of some of the more enlightened civilians, both before and since the time of Coke. See Boerius, Quæstiones, 168; Voet. ad Pand. lib. 22, tit. 3, N. 14, &c.

<sup>3</sup> 2 Gr. Russ. 727. It is retained in Devotus, Instit. Canon. lib. 3, tit. 9, § 30, Paris, 1852.

in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely ; but, if the property were not found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption, and " (if it stood alone) "entitled to no weight."<sup>1</sup>

*Division of presumptions of fact into slight and strong — slight—do not constitute proof, or shift the burden of proof.*

§ 319. A division of presumptions of fact, more accurate in principle and more useful in practice, is obtained by considering them with reference to their effect on the burden of proof, or onus probandi ; the general principles and rules of which have been explained in the first part of the present book.<sup>2</sup> Præsumptiones hominis, or presumptions of fact, are divided into *slight* and *strong*, according as they are or are not of sufficient weight to shift the burden of proof.<sup>3</sup> *Slight* presumptions, although sufficient to excite suspicion, or to produce an impression in favor of the truth of the facts they indicate, do not, when *taken singly*, either constitute proof or shift the burden of proof. Thus, stolen property found in the possession of the supposed criminal a long time after the theft, though well calculated to excite suspicion

<sup>1</sup> Archb. Crim. Plead. 208, 15th Ed.

<sup>2</sup> *Suprà*, pt. 1, ch. 2.

<sup>3</sup> "Præsumptio [hominis] rectè dividitur in leviolem et fortiolem. Levior movet suspicionem, et judicem quodammodo inclinat ; sed per se nullum habet juris effectum, nec onere probandi levat." Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 15. See also Matth. de Prob. c. 2, NN. 1 & 5 ; Westenbergius, Principia Juris, lib. 22, tit. 3, §§ 26, 27.



against him, is, when standing alone, insufficient even to put him on his defense.<sup>1</sup> So, where money has been stolen, and \*money, similar in amount and in the nature of the pieces, is found in the posses- [ \* 433 ] sion of another person, but none of the pieces are identified, and there is no other evidence against him.<sup>2</sup> And in the civil law, where a guardian who originally had no estate of his own, became opulent during the continuance of his guardianship, this fact, standing alone, was deemed insufficient to raise even a *prima facie* case of dishonesty against him;<sup>3</sup> the Code justly observing, "*nec enim pauperibus industria, vel augmentum patrimonii quod laboribus, et multis casibus quaeritur, interdicendum est.*"<sup>4</sup> To this class belong the presumption of guilt, derived from foot-marks resembling those of a particular person being found on the snow or ground near the scene of crime;<sup>5</sup> the presumption of homicide from previous quarrels,<sup>6</sup> or from the accused having a pecuniary interest in the death of the deceased.<sup>7</sup>

*Use and effect of.*

§ 320. But although presumptions of this kind are of no weight when standing alone, still they not only form important links in a chain of evidence, and frequently render complete a body of proof which would otherwise be imperfect, but the concurrence of a large number of them may (each contributing its individual share of probability) not only shift the *onus probandi*, but amount to

<sup>1</sup> *Suprà*, bk. 2, pt. 2.

<sup>2</sup> 1 Stark. Ev. 569, 3rd Ed.; Id. 854, 4th Ed.

<sup>3</sup> Voet. ad Pand. lib. 22, tit. 3, N. 14; 2 Ev. Poth. 345.

<sup>4</sup> Cod. lib. 5, tit. 51, l. 10.

<sup>5</sup> Mascardus de Probat. quæst. 8, NN. 21-23; *R. v. Britton*, 1 Fost. & F. 354.

<sup>6</sup> Domat, Lois Civiles, Part 1, liv. 3, tit. 6, Préamb.

<sup>7</sup> 3 Benth. Jud. Ev. 188.

proof of the most convincing kind.' "A man's having observed the ebb and flow of the tide to-day," observes [ \* 434 ] an eminent divine,<sup>2</sup> "affords some \*sort of presumption, though the lowest imaginable, that it may happen again to-morrow; but the observation of this event for so many days, and months, and ages together, as it has been observed by mankind, gives us a full assurance that it will." Convictions, even for capital offenses, constantly take place on this kind of evidence;<sup>3</sup> and the following good illustration, in a civil case, is given by Pothier from the text of the Roman law:<sup>4</sup> "A sister was charged with the payment of a sum of money to her brother; after the death of the brother, there was a question whether this was still due to his successor. Papinian decided<sup>5</sup> that it ought to be presumed that the brother had released it to his sister, and he founded the presumption of such release on three circumstances: 1st. From the harmony which subsisted between the brother and the sister; 2nd. From the brother having lived a long time without demanding it; 3rd. From a great number of accounts being produced which had passed between the brother and sister, upon their respective affairs, in none of which there was any mention of it. Each of these circumstances, taken separately, would only have formed a simple presumption, insufficient to establish that the deceased had released the debt; but their concur-

<sup>1</sup> 1 Ev. Poth. art. 815, 816; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, NN. 4 and 16; Id. Positiones Jur. sec. Pand. lib. 22, tit. 3, N. 19; Matth. de Crim. ad lib. 48 Dig. tit. 15, c. 6; Voet. ad Pand. lib. 22, tit. 3, N. 18; 1 Stark. Ev. 570, 3rd Ed.; Id. 855, 4th Ed.

<sup>2</sup> Butler's Analogy of Religion, Introduction.

<sup>3</sup> See *infra*, sect. 3, and App.

<sup>4</sup> 1 Ev. Poth. art. 816.

<sup>5</sup> "Denied" in Evans's translation of Pothier is an obvious misprint.

rence appeared to Papinian to be sufficient proof of such release."<sup>1</sup>

*Strong* — shift the burden of proof — *primâ facie* evidence.

§ 321. *Strong* presumptions of fact, on the contrary, shift the burden of proof, even though the evidence to \*rebut them involve the proof of a negative.\* [ \* 435 ] The evidentiary fact giving rise to such a pre-<sup>s</sup>umption is said to be "*primâ facie* evidence" of the principal fact of which it is evidentiary. Thus, possession is *primâ facie* evidence of property; and the recent possession of stolen goods is sufficient to call on the accused to show how he came by them, and, in the event of his not doing so satisfactorily, to justify the conclusion that he is the thief who stole them.<sup>3</sup> So, a receipt for rent accrued due subsequently to that sued for, is *primâ facie* evidence that all rent had been paid up to the time of giving the receipt—as it is unlikely that a landlord would not call in the debt of longest standing first.<sup>4</sup> And a beautiful instance of this species of presumption is afforded by the celebrated judgment of Solomon; who, with the view of ascertaining which of

<sup>1</sup> This is the law "*Procula*," which will be found Dig. lib. 22, tit. 3, l. 26. Sir W. D. Evans, in his valuable edition of Pothier, observes on this passage, that it does not sufficiently appear from the law, as given in the Digest, that the brother had lived any great length of time, or that harmony had existed between him and his sister. He seems, however, to have overlooked the phrase "*quamdiu vixit*," and the peculiar expression "*desideratum*."

<sup>2</sup> "*Presumptio fortior vocatur, quæ determinat judicem, ut credat, rem certo modo se habere, non tamen quin sentiat, eam rem aliter se habere posse Ideoque ejus hic est effectus, quod transferat onus probandi in adversarium, quo non probante, pro veritate habetur.*" Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 16. See, also, Heinec. ad Pand. Pars. 4, § 124; Matth. de Prob. cap. 2, N. 5; Westenbergius, Principia Juris, lib. 22, tit. 3, § 27.

<sup>3</sup> See bk. 2, pt. 2.

<sup>4</sup> Gilb. Ev. 157, 4th Ed.

two women who laid claim to a child was really the mother, gave orders in their presence, for the child to be cut in two and a part given to each; on which the true mother's natural feelings interposed, and she offered rather to abandon her claim to the child than suffer it to be put to death.<sup>1</sup>

*Effect of.*

§ 322. Presumptions of this nature are entitled to great weight, and, when there is no other evidence, are generally decisive in civil cases.<sup>2</sup> In criminal, and more especially in capital cases, a greater degree of caution is, [ \* 436 ] of course, requisite, and the technical rules \*regulating the burden of proof are not always strictly adhered to.<sup>3</sup>

*Distinguishable from præsumptiones juris tantum.*

§ 323. The resemblance between inconclusive presumptions of law and strong presumptions of fact cannot have escaped notice—the effect of each being to assume something as true until rebutted; and, indeed, in the Roman law, and other systems where the decision of both law and fact is intrusted to a single judge, the distinction between them becomes in practice almost imperceptible.<sup>4</sup> But it must never be lost sight of in the common law, where the functions of judge and jury should always be kept distinct. Unfortunately, how-

<sup>1</sup> 1 Kings, iii. 16.

<sup>2</sup> Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 16.

<sup>3</sup> Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 16. See *R. v. Hadfield*, 27 Ho. St. Tr. 1282, 1353.

<sup>4</sup> “Quælibet exempla fortiorum, quas diximus Præsumptionum, quatenus legibus prodita sunt, ad hanc classem” (scil. præs. jur.) “non malè referuntur, si hac distinctione placeat uti.” Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 18. See, also, Gresley, Evidence in Eq. 483-4, 2nd Ed.

ever, the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, sometimes as one which it was obligatory on them to make, &c.<sup>1</sup>

*Mixed presumptions — Grounds of.*

\*§ 324. We now come to the consideration of "Mixed presumptions;" or, as they are [\* 437] sometimes called, "Presumptions of mixed law and fact," and "Presumptions of fact recognized by law." These hold an intermediate place between the two former; and consist chiefly of certain presumptive inferences which, from their strength, importance, or frequent occurrence, attract, as it were, the observation of the law; and, from being constantly recommended by judges and acted on by juries, become, in time, as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice. Some, also, have been either introduced or recognized by statute. They

<sup>1</sup> Phill. & Am. Ev. 460, 461; 1 Phill. Ev. 470, 10th Ed. When such language is found in the judgments of the superior courts, it is not surprising that the proceedings of inferior ones should exhibit even greater inaccuracy and confusion. Nothing, for instance, is more common than to hear a jury told from the bench, that when stolen property is found in the possession of a party shortly after a theft, *the law presumes him to be the thief*;—a direction both wrong and mischievous,—as calculated to convey to the minds of the jury the false impression that when the possession of the stolen property has been traced to the accused, their discretionary functions are at an end. Our ablest judges tell juries in such cases that they ought, as men of common sense, to make the presumption, and act upon it, unless it be rebutted, either by the facts as they appear in the evidence for the prosecution, or by the evidence or explanation of the accused.

are, in truth, a sort of quasi præsumptiones juris; and, like the strict legal presumptions, may be divided into three classes: 1st. Where the inference is one which common sense would have made for itself; 2nd. Where an artificial weight is attached to the evidentiary facts beyond their mere natural tendency to produce belief; and, 3rd. Where, from motives of legal policy, juries are recommended to draw inferences which are purely artificial. The two latter classes are chiefly found where long established rights are in danger of being defeated by technical objections, or by want of proof of what has taken place a great while ago; in which cases it is every day's practice for judges to advise juries to presume, without proof, the most solemn instruments, such as charters, grants, and other public documents, as likewise all sorts of private conveyances.<sup>1</sup>

*Artificial presumptions formerly carried too far — Legitimate use of artificial presumptions.*

§ 325. Artificial presumptions of this kind require to be made with caution, and it must be acknowledged that the legitimate limits of the practice have often been very much overstepped.<sup>2</sup> There are many cases \*on [ \* 438 ] this subject in the books which cannot now be considered as law, and some of which even border on the ridiculous. Thus, in an action on the game laws, it was suggested that the gun with which the defendant fired was not charged with shot, but that the bird might have died in consequence of the fright; and the jury having

<sup>1</sup> *Infra*, sect. 2, sub-sect. 5.

<sup>2</sup> See *Doe d. Fenwick v. Reed*, 5 B. & A. 232, 236-7, per Abbott, C. J.; *Harwood v. Oglander*, 8 Ves. 106, 130, note (a), per Lord Eldon, C.; *Day v. Williams*, 2 C. & J. 460, 461, per Bayley, B.; *Doe d. Shewen v. Wroot*, 5 East, 132; *Gibson v. Clark*, 1 Jac. & W. 159, 161, note (a).

given a verdict for the defendant, the court refused a new trial;<sup>1</sup> and in another case, Lord Ellenborough is reported to have cited with approbation an expression of Lord Kenyon, that, in favor of modern enjoyment where no documentary evidence existed, he would presume two hundred conveyances, if necessary.<sup>2</sup> So, in *Wilkinson v. Payne*,<sup>3</sup> which was an action on a promissory note, given to the plaintiff by the defendant in consideration of his marrying the defendant's daughter, to which the defense set up was that the marriage was not a legal one, as the parties were married by license when the plaintiff was under age, and there was no consent of his parents or guardians; it appeared in evidence that both his parents were dead when the marriage was celebrated, and there was no legal guardian; but that the plaintiff's mother, who survived the father, had, when on her death-bed, desired a friend to become guardian to her son, with whose approbation the marriage took place. It also appeared that, when the plaintiff came of age, his wife was lying on her death-bed, in extremis, and that she died in three weeks afterward; but that in her life-time she and the plaintiff were always treated by the defendant and his family as man and wife. Upon these facts, Grose, J., left to the jury to \* presume a *subsequent* legal marriage, which they did accordingly, and found a verdict for [ \* 439 ] the plaintiff, and the court refused a new trial.<sup>4</sup> This

<sup>1</sup> Cited by Lord Kenyon in *Wilkinson v. Payne*, 4 T. R. 468, 469.

<sup>2</sup> *Countess of Dartmouth v. Roberts*, 16 East, 334, 339.

<sup>3</sup> 4 T. R. 468.

<sup>4</sup> These are not the only instances which might be cited. See the case of *Powell v. Milbanke*, Cowp. 103 (n), where Lord Mansfield advised a jury to presume a grant from the crown, on the strength of enjoyment under two presentations stolen from the crown. That case was condemned by Lord Eldon, C.,

case has been severely commented on' by Sir W. D. Evans;<sup>1</sup> and, indeed, it is impossible not to assent to the observation, that rulings of this kind afford a temptation to juries to trifle with their oath, by requiring them to find, as true, facts which are probably, if not obviously, false.<sup>2</sup> Of late years more correct views have grown up; and in several modern cases judges have refused to direct certain artificial presumptions to be made.<sup>3</sup> Still, when restrained within their legitimate limits, presumptions of this kind are not without their use. To suppose an absurdity, in order to meet the exigency of a particular case, must ever be fraught with mischief: but it is evidently different when, in conformity to a settled rule of practice, juries are directed to presume the existence of ancient documents, or the destruction of formal ones; or to make other presumptions on subjects necessarily removed from ordinary comprehension, but which the rules of law require to be submitted to and determined by them. Both judges and juries are frequently compelled, in obedience to the Statutes of Limitations and the strict presumptions of *\*law*, to assume, as true, [\* 440] facts which in reality are not so; and the ends of justice may render a similar course necessary in the case of those mixed presumptions which, although not technically, are virtually made by law. Some of the

in *Harmood v. Oglander*, 8 Ves. 106, 130, note (a), and was spoken of by Eyre, C. B., in *Gibson v. Clark*, 1 Jac. & W. 159, 161, note (a), as "presumption run mad." See, also, *Doe d. Bristowe v. Pegge*, 1 T. R. 758, note; and *Lade v. Holford*, B. N. P. 110.

<sup>1</sup> 2 Ev. Poth. 330. See, also, Gresley, Evid. in Eq. 485-6, 2nd Ed.; and per Parke, B., in *Doe d. Lewis v. Davies*, 2 M. & W. 511.

<sup>2</sup> 3 Stark. Ev. 934, 3rd Ed.; Id. 754, 4th Ed.; 2 Ev. Poth. 331.

<sup>3</sup> *Doe d. Fenwick v. Reed*, 5 B. & A. 232; *Doe d. Howson v. Waterton*, 3 Id. 149; *Doe d. Hammond v. Cooke*, 6 Bingh. 174; *Wright v. Smithies*, 10 East, 409; *R. v. The Chapter of Exeter*, 12 A. & E. 512.



most important of these presumptions have in modern times been erected by the legislature into rules of law.<sup>1</sup>

*Directions to juries respecting presumptions of fact and mixed presumptions.*

§ 326. The terms in which presumptions of fact and mixed presumptions should be brought under the consideration of juries by the court depend on their weight, either natural or technical. When the presumption is one which the policy of law and the ends of justice require to be made, such as the existence of moduses, and other immemorial rights, from uninterrupted modern user, the jury should be told that they *ought* to make the presumption unless evidence is given to the contrary—it should not be left to them as a matter for their discretion.<sup>2</sup> And the same seems to apply where the presumption is one of much natural weight and of frequent occurrence, as where larceny is inferred from the recent possession of stolen property, &c. In the case of presumptions of a less stringent nature, however, such a direction would be improper; and perhaps the best general rule is, that the jury should be *advised* or *recommended* to make the presumption.<sup>3</sup> To lay down rules for all cases would of course be impossible; but the language of the courts, expressed in decided cases in regard to particular presumptions, may in general be expected to exercise considerable influence in the

<sup>1</sup> See 3 & 4 Will. 4, c. 42, s. 3; *infra*, sect. 2, sub-sect. 7; 2 & 3 Will. 4, cc. 71 and 100; *infra*, sect. 2, sub-sect. 5.

<sup>2</sup> *Shephard v. Payne* (in Cam. Scac.), 16 C. B., N. S. 132, 135; *Lawrence v. Hitch* (in Cam. Scac.), L. Rep., 3 Q. B. 521; *Jenkins v. Harvey*, 1 C. M. & R. 877; *Pilots of Newcastle v. Bradley*, 2 E. & B. 431. See, however, per Lord Denman in *Brune v. Thompson*, 4 Q. B. 543, 552.

<sup>3</sup> See *R. v. Jolliffe*, 2 B. & C. 54.

[ \* 441 ] determination \*of future cases in which the like presumptions may arise.<sup>1</sup>

*New trials for disregard by juries of presumptions of fact or mixed presumptions.*

§ 327. It has been already stated,<sup>2</sup> as a characteristic distinction between presumptions of law and presumptions of fact, either simple or mixed, that when the former are disregarded by a jury a new trial is granted as matter of right, but that the disregard of any of the latter, however strong and obvious, is only ground for a new trial at the discretion of the court in banc.<sup>3</sup> Now, although questions of fact are the peculiar province of a jury, the courts, by virtue of their general controlling power over every thing that relates to the administration of justice,<sup>4</sup> will usually grant a new trial when an important presumption of fact, or an important mixed presumption, has been disregarded by a jury. But new trials will not always be granted when *successive* juries disregard such a presumption; and the interference of the court in this respect depends very much on circumstances. As a general rule, it may be stated that not more than one or two new trials would be granted.<sup>5</sup> There are, however, some mixed presumptions which the policy of the law, convenience, and justice, so strongly require to be made that the courts will go farther in order to uphold them. The principal among these are

<sup>1</sup> Phill. & Am. Ev. 461; 1 Phil. Ev. 470, 10th Ed.

<sup>2</sup> *Suprà*, § 304.

<sup>3</sup> Phill. & Am. Ev. 459; 1 Phill. Ev. 467, 10th Ed.; *Tindal v. Brown*, 1 T. R. 167.

<sup>4</sup> *Goodwin v. Gibbons*, 4 Burr. 2108; *Burton v. Thompson*, 2 Burr. 664.

<sup>5</sup> Phill. & Am. Ev. 459-460. See *Foster v. Steele*, 3 Bing. N. C. 892; *Swinerton v. The Marquis of Stafford*, 3 Taunt. 232; *Foster v. Allenby*, 5 Dowl. 619; *Davies v. Roper*, 2 Jurist, N. S. 167.

the existence of prescriptive rights and grants from long continued possession,<sup>1</sup> &c. It is, however, rather a strong proposition \*to lay down, as is sometimes done,<sup>2</sup> [\* 442] that the courts would set aside verdicts *ad infinitum* in such cases. That would be very like setting aside trial by jury; and where several sets of men on their oaths find in a particular way, it would be more reasonable to presume that they did not do so without good grounds.

## SUB-SECTION III.

## CONFLICTING PRESUMPTIONS.

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*Maxim "Stabatur præsumptioni donec probetur in contrarium."*

§ 328. It is obvious, from what has been already said, that the maxim, "Stabatur præsumptioni donec probetur in contrarium,"<sup>3</sup> must be understood with considerable limitation. That maxim is obviously inapplicable either to irrebuttable presumptions (*præsumptiones juris et de jure*), whose very nature is to exclude all contrary proof, or to those presumptions of fact which have been denomi-

<sup>1</sup> *Jenkins v. Harvey*, 1 C. M. & R. 877, 895, per Alderson, B.; *Gibson v. Muskett*, 3 Scott, N. R. 419.

<sup>2</sup> Gale on Easements, 95, 3rd Ed., &c.

<sup>3</sup> Co. Litt. 373 b; 2 Co. 48 a; 2 Co. 73 b; Hob. 297; Jenk. Cent. 1, cas. 62; 3 Bl. C. 371.

nated slight (*præsumptiones leviores*); and it is, therefore, necessarily restricted to such presumptions of law or fact, mixed presumptions, and pieces or \*masses of presumptive evidence, as throw the burden of [ \* 443 ] proof on the parties against whom they militate.

### *Conflicting presumptions.*

§ 329. Rebuttable presumptions of any kind may be encountered by presumptive, as well as by direct evidence;<sup>1</sup> and the court may even take judicial notice of a fact—such, for example, as the increase in the value of money—for the purpose of rebutting a presumption which would otherwise have arisen from uninterrupted modern usage.<sup>2</sup> Again, it not unfrequently happens that the same facts may, when considered in different points of view, form the bases of opposite inferences; and in either of these cases it becomes necessary to determine the relative weight due to the conflicting presumptions. The relative weight of conflicting presumptions of *law* is, of course, to be determined by the court or judge—who should also direct the attention of the jury to the burden of proof as affected by the pleadings, &c., and to the evidence in each case. And although the decision of questions of fact constitutes the peculiar province of the jury, they ought, especially in civil cases, to be guided by those rules regulating the burden of proof and the weight of conflicting presumptions, which are recognized by law, and have their origin in natural equity and con-

<sup>1</sup> *Brady v. Cubitt*, 1 Dougl. 31, 39, per L. Mansfield; *Jayne v. Price*, 5 Taunt. 326, 328, per Heath, J.; *R. v. The Inhabitants of Harborne*, 2 A. & E. 540; *Rickards v. Mumford*, 2 Phillim. 24, 25, per Sir John Nicholl; *Doe d. Harrison v. Hampson*, 4 C. B. 267; *Simpson v. Dendy*, 8 C. B. N. S. 433; Menochius de Præs. lib. 1, quæst. 29, 30, 31; Mascardus de Prob. Concl. 1281.

<sup>2</sup> *Bryant v. Foot*, L. Rep., 2 Q. B. 161; S. C. (in Cam. Scac.) 3 Id. 497.

venience. It must not, however, be supposed that every *præsumptio juris* is *ex vi termini* stronger than every *præsumptio hominis*, or *præsumptio mixta*; on the contrary, which of any two presumptions ought to take precedence must be determined by the nature of each. The presumption of innocence, for instance,\* is *præsumptio juris*; but every day's practice shows [\* 444] that it may be successfully encountered, by the presumption of guilt arising from the recent possession of stolen property<sup>1</sup> — which is at most only *præsumptio mixta*.

### *Rules respecting.*

§ 330. The subject of conflicting presumptions seems almost to have escaped the notice of the writers on English law; but several rules respecting it have been laid down by civilians. Some of these are, perhaps, questionable;<sup>2</sup> but the following appear sound in principle; and, provided they are understood as merely rules for general guidance, and not as of universal obligation, they are likely to be serviceable in practice.

<sup>1</sup> *Suprà*, bk. 2, pt. 2.

<sup>2</sup> In addition to those mentioned in this chapter, Menochius gives the following (*De Præsumptionibus*, lib. 1, quæst. 29. See also *Id. De Arbitrariis Judicium*, lib. 2, casus 472): "1. *Præsumptio quæ à substantiâ provenit, dicitur potentior illâ quæ descendit à solemnitate.* 2. *Præsumptio judicatur potentior quæ est benignior.* 3. *Præsumptio judicatur firmior et potentior quæ juri communi inhæret, et illa debilior quæ juri speciali.* 4. *Præsumptio est validior et potentior quæ verisimilitudini magis convenit.* 5. *Præsumptio quæ descendit à quasi possessione est potentior illâ, quæ est, quod quælibet res præsumatur libera.* 6. *Præsumptio est potentior et firmior quæ est negativa, illâ quæ est affirmativa.* 7. *Præsumptio illa judicatur potentior et firmior quæ est fundata in ratione naturali, illâ quæ est fundata in ratione civili.* 8. *Firmior et validior existimatur illa præsumptio quâ absurda et inæqualia evitantur.* 9. *Præsumptio quæ ducitur à facto, est firmior et potentior eâ quæ sumitur à non facto.* 10. *Præsumptio quæ favet animæ, sicque salutis æternæ, potentior et firmior est illâ quâ dicimus delictum non præsumi.*"

*Rule I. Special presumptions take precedence of general ones.*

§ 331. I. *Special presumptions take precedence of general ones.*<sup>1</sup> This is the chief rule; and seems a branch of the more general principle, "In toto jure [ \* 445 ] \*generi per speciem derogatur."<sup>2</sup> It rests on the obvious principle that, as all general inferences (except, of course, such as are juris et de jure) are rebuttable by direct proof, they will naturally be affected by that which comes nearest to it; namely, specific proximate facts or circumstances, which give rise to special inferences, negating the applicability of the general presumption to the particular case. Thus, although the owner in fee of land is presumed to be entitled to the minerals found under it,<sup>3</sup> the presumption may be rebutted by that arising from non-enjoyment by him, and the use of those minerals by others.<sup>4</sup> So, although the possession of land and the perception of rent is *prima facie* evidence of a seizin in fee, still, where the demandant in a writ of right claimed under a remote ancestor, it was held that the presumption was successfully encountered by proof that the demandant and his father, through whom his title was traced, had for a long time allowed other parties to keep possession of the land, when they themselves lived in the neighborhood and

<sup>1</sup> Menochius de Præsumptionibus, lib. 1, quæst. 29, NN. 7 & 8; Id., De Arbitrariis Judicium, lib. 2, casus 472, N. 14 *et seq.*; Huberus, Præl. Juris Civilis, lib. 22, tit. 3, N. 17; Id., Positiones Juris sec. Pand. lib. 22, tit. 3, N. 24; Mascardus de Probationibus, Concl. 1231, NN. 6 & 7; 2 Ev. Pothier, 332.

<sup>2</sup> Dig. lib. 50, tit. 17, l. 80. See also Sext. Decretal. lib. 5, tit. 12, de Reg. Juris, Reg. 34.

<sup>3</sup> *Roubotham v. Wilson*, 8 H. L. C. 348.

<sup>4</sup> *Rowe v. Brenton*, 8 B. & C. 737; *Rowe v. Grenfel*, R. & M. 396.

must have been aware of it.<sup>1</sup> The flowing of the tide is presumptive evidence of a navigable river;<sup>2</sup> but the presumption may be removed by proof of the narrowness of the stream, or the shallowness of its channel, or of acts of ownership by private individuals, inconsistent with a right of public navigation.<sup>3</sup> The presumption of innocence is a very general, and rather favored presumption; but guilt, as we see every day, may be proved by presumptive evidence. Where the publication of a libel has been proved, malice will be presumed:<sup>4</sup> as it will also on a charge of murder, \*from the fact of [ \* 446 ] slaying.<sup>5</sup> So, a libel sold by a servant in the discharge of his ordinary duty is presumptive, and at least since the 6 & 7 Vict. c. 96, s. 7, only presumptive, evidence of a publication by the master.<sup>6</sup> And it is said to have been a rule in the ecclesiastical courts, that, where the existence of an adulterous intercourse had been proved, its continuance would be presumed so long as the parties lived under the same roof.<sup>7</sup> So, although a fine, without any deed executed to declare the uses, was presumed to have been levied to secure the title of the conusor, evidence was receivable to rebut the presumption, and to show that it was to vest the land in the conusee.<sup>8</sup> It is not, however, every circumstance or special inference that will suffice to set aside a general presumption, either of law or fact.

<sup>1</sup> *Jayne v. Price*, 5 Taunt. 326.

<sup>2</sup> *Miles v. Rose*, 5 Taunt. 705.

<sup>3</sup> *Id.*; *R. v. Montague*, 4 B. & C. 598; *Mayor of Lynn v. Turner*, Cowp. 86.

<sup>4</sup> *Haire v. Wilson*, 9 B. & C. 643.

<sup>5</sup> *Foster's C. L.* 255, 290; 1 Hale, P. C. 455; 1 East, P. C. 340.

<sup>6</sup> *R. v. Walter*, 3 Esp. 21; *R. v. Gutch*, 1 Mood. & M. 437.

<sup>7</sup> *Turton v. Turton*, 3 Hagg. N. C. 350.

<sup>8</sup> *Roe v. Popham*, 1 Dougl. 25; Peake's Ev. 119, 5th Ed.

*Rule 2. Presumptions derived from the course of nature are stronger than casual presumptions.*

§ 332. II. *Presumptions derived from the course of nature are stronger than casual presumptions.*<sup>1</sup> This is a very important rule, derived from the constancy and uniformity observable in the works of nature, which render it probable that human testimonies or particular circumstances which point to a conclusion at variance with her laws, are, in the particular instance, fallacious. “*Naturæ vis maxima.*”<sup>2</sup> Thus, on an indictment for stealing a log of timber, it would probably be considered a sufficient answer to any chain of presumptive evidence, or even to the positive testimony of an alleged eye-witness, to show that the log in question was so large and heavy that ten of the strongest men could not [\* 447] “move it.”<sup>3</sup> A charge of robbery brought by a strong person against a girl or a child, or of rape brought by an athletic female against an old or sickly man, would be refuted in this way. So, although this likewise rests in some degree on principles of public policy,<sup>4</sup> sanity is always presumed, even when the accused is on his trial on a capital charge.<sup>5</sup> (a) Under this head

<sup>1</sup> Menochius de Præs. lib. 1, quæst. 29, N. 9; Id. de Arbitrariis Judicium, lib. 2, casus 472, N. 19; Mascardus de Probat. quæst. 10, N. 18; and Concl. 1231, NN. 17 & 18; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 17; Id. Positiones Juris sec. Pand. lib. 22, tit. 3, N. 24.

<sup>2</sup> 2 Inst. 564; Plowd. 309.

<sup>3</sup> Menochius de Arbitrariis Jud. lib. 2, casus 472, N. 21.

<sup>4</sup> *Infrà*, sect. 3, sub-sect. 1.

<sup>5</sup> Answer of the Judges to the House of Lords, 8 Scott, N. R. 595; 1 Car. & K. 131; *R. v. Stokes*, 3 Car. & K. 185.

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(a) The law presumes that every person is *sane*, and capable of distinguishing between right and wrong, and therefore competent to attend to his own business, and morally and legally responsible for all his acts. *State v. Starling*, 6



come also those instances in which presumptions drawn from the natural feelings of the human heart have been found to prevail over others, and, among the rest, over

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Jones (N. C.), 366; *Newcomb v. State*, 37 Miss. 383; *Armstrong v. Tinnons*, 5 Harr. (Del.) 342; *Menkins v. Lightner*, 18 Ill. 282; *Com. v. Heath*, 11 Gray (Mass.), 303; *State v. McCoy*, 34 Mo. 531; *State v. Sewell*, 3 Jones (N. C.), 245; *Myatt v. Walker*, 44 Ill. 485; *People v. Garbutt*, 17 Mich. 9; *Baxter v. Abbott*, 7 Gray (Mass.), where it is held that the legal presumption is in favor of the sanity of a testator. *Com. v. Heath*, 11 Gray (Mass.), 303; *People v. Coffman*, 24 Cal. 280; *Walters v. People*, 32 N. Y. 147; *Thornton v. Appleton*, 29 Me. 298; *United States v. Glue*, 1 Curtis (U. S. C. C.), 1; *Com. v. Haskell*, 2 Brewster (Penn.), 491. In *Com. v. Eddy*, 7 Gray (Mass.), 583, it is held that the burden of proof upon the prosecution, so far as the prisoner's sanity is concerned, is sustained by the presumption of sanity, until rebutted by a preponderance of the whole evidence.

But when habitual, as distinguished from mere temporary, insanity is once established, its continuance is presumed until otherwise proved. The maxim "once insane, always insane," has however been very much relaxed, and is not applicable to merely temporary insanity. *Stewart v. Redditt*, 3 Md. 67; *Staples v. Wellington*, 58 Me. 453; *Carpenter v. Carpenter*, 8 Bush (Ky.), 283.

But, as applied to habitual insanity, or insanity that does not result from a special cause, that is in no measure connected with the person so as to be dependent upon a particular condition for its duration, the maxim has full force and application. *Armstrong v. Tinnons*, 3 Harr. (Del.) 342; *State v. Roddick*, 7 Kan. 143; *Carpenter v. Carpenter*, *ante*; *Aurentz v. Anderson*, 3 Pittsb. (Penn.) 310; *Achey v. Stevens*, 8 Ind. 411; *Cook v. Cook*, 53 Barb. (N. Y.) 180; *Menkins v. Lightner*, 18 Ill. 282; *Wray v. Wray*, 33 Ala. 187; *Thornton v. Appleton*, 29 Me. 298; *People v. Francis*, 38 Cal. 183. But this must be understood as applicable only in civil actions, and as affecting the civil status of an individual. Where a man is charged with a crime, so strong is the presumption of moral accountability, and of the possession of sufficient capacity to distinguish between right and wrong, that proof that he was insane at an anterior, or subsequent period to the commission of the crime, does not establish the fact of actual absence of moral responsibility *at the time when the crime was committed*; but is nevertheless competent evidence to go to the jury, to be considered by them in connection with other circumstances, in determining the question of sanity at the moment when the crime was committed. *State v. Graviott*, 22 La. Ann. 587.

In *Regina v. McNaughton*, 10 Clark & Fin. 200, the defendant was charged with murder, and the fact of willful homicide having been fully established, the defense of insanity was set up, and upon this defense the defendant was acquitted. In consequence of this verdict, the House of Lords proposed certain questions to the judges. To the questions so proposed to them the judges returned full answers, and among other things laid down the broad rule that

that arising from possession, as in the judgment of Solomon already mentioned.<sup>1</sup> So, where a parent advances money to a child, it is supposed to be by way of gift and

<sup>1</sup> 1 Kings, iii. 16 ; *suprà*, sub-sect. 2.

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whenever a person is charged with homicide, or other felony, and the defense of *insanity* is interposed, the judge should charge the jury "that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his acts, until the contrary be satisfactorily established," and that to establish a defense on the ground of insanity, it must be clearly shown that, *at the time of the committing of the act charged in the indictment*, the party accused "was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or that if he did know it, that he did not know he was doing what was wrong." 8 Scott N. R. 595 ; 1 Car. & K. 181 ; State v. Graviott, 22 La. Ann. 587 ; see Regina v. Stokes, 3 Car. & K. 188. In Rex v. Oxford, 9 C. & P. 525, the respondent was indicted for attempting to take the life of the Queen, and the defense set up was insanity. In that case the court held that the question for the jury was, whether the defendant was laboring under that species of insanity which satisfied them that he was quite unaware of the *nature, character and consequences* of the act he was committing. Whether his mind was, in fact, diseased to such an extent, that *at the time he was committing the act*, he was really unconscious that he was committing a crime, or that the act was criminal. As before stated, the *presumption is*, that every person is sane and fully aware of the natural and probable consequences of their acts, and that the burden of proving the contrary is upon the person seeking to avoid the force of the presumption. This must be done to the satisfaction of the jury, and it may here be said that there are a variety of methods by which the force of the presumption may be overcome, and here it should be stated that, in order to establish the insanity of the respondent in a criminal case, it is not necessary to show that the insane condition of his mind *existed before or continued after* the crime was committed. It is enough, if it be satisfactorily established that he was insane *at the time when the act was done*. That a person may, by a certain condition of things, be driven to such sudden frenzy, that, for a moment, while under their control, he may be deprived of all reason, and of all moral or legal accountability for his acts, is a fact too well sustained by authority to be seriously denied. But the evidence required to establish this condition of the mind must be very strong, and the circumstances conspiring to produce it must be of a character such as would be calculated to produce undue excitement of mind in a person of the prisoner's temperament.

In order to establish the defense of insanity, the force of the presumption of sanity must be overcome by such evidence as fairly convinces the jury that the respondent, *at the time when the act was done*, and "as applied to the act in question, was entirely deprived of reason and the knowledge that he was doing

not by way of loan;<sup>1</sup> and the harsh doctrine of collateral warranty rested, in some degree, on a strained application of this principle.<sup>2</sup>

<sup>1</sup> Dig. lib. 10, tit. 2, l. 50; Voet. ad Pand. lib. 22, tit. 3, N. 15, vers. fin.; per Bayley, J., in *Hick v. Keats*, 4 B. & C. 69, 71.

<sup>2</sup> Co. Litt. 373 a.

*wrong in committing it.* See Allison's Principles of the Criminal Law of Scotland, p. 654; *State v. Gut*, 13 Minn. 341; *People v. Garbutt*, 17 Mich. 9. Defenses, where the insanity set up is of a temporary character, and is induced by sudden frenzy, are always regarded with suspicion, and should never prevail, except where they are established by a fair balance of proof. *Regina v. Stokes, ante.* Tracey, J., in *Arnold's Case*, How. St. Trials, 764, 765, says: "It is not every idle or frantic humor of a man, or something unaccountable in his actions, which will show him to be insane, or such a madman as to exempt him from punishment." The conduct of the prisoner, nevertheless, furnishes the best evidence, and it may be said the only evidence from which the fact of insanity can be established. But the fact that men of bad motives and criminal purposes often feign insanity as a cover for their crimes makes it highly important that all the facts upon which the defense is predicated should be subjected to the closest scrutiny, and weighed with the nicest care. In *Regina v. Stokes*, 3 Car. & K. 188, Rolfe, B., charged the jury that if they had any doubt about the prisoner's insanity, it would be their duty to convict him; for every man is presumed to be sane until proved to be otherwise.

In *Hadfield's Case* (Collision on Lunacy, 480; 27 How. St. Tr. 1316), Mr. Erskine, in defending the prisoner, laid down the law (which was approved and adopted by the court in that case, and has been acted on as the law applicable to these defenses in England ever since) thus: "The prisoner must appear to the jury to be '*non compos mentis*,' in the legal acceptance of the term; and that, not at any *anterior period*, which can have no bearing upon any case whatever, but *at the moment when the contract was entered into or the crime committed.*" The fact that a party has previously been insane, or that he has been insane since the crime was committed, does not of itself establish the fact that he was insane *at the time when the crime was committed*; although it is a circumstance which may be taken into consideration, but is not of itself sufficient to overcome the force of the legal presumption of sanity and moral accountability. In *Bowler's Case*, Collision on Lunacy, 673, LeBlanc, J., left it for the jury to determine "whether the prisoner, when he committed the offense, was capable of distinguishing between right and wrong, or under the influence of any illusion in respect to the prosecutor, which rendered his mind *at the moment* insensible of the nature of the act which he was about to commit; since in that case he would not be legally responsible for his conduct." In that case evidence was adduced to show that the prisoner had previously been insane, and a commission of lunacy was produced, dated June 17, 1813, with a finding

*Rule 3. Presumptions are favored which give validity to acts.*

§ 333. III. *Presumptions are favored which give validity to acts.*<sup>1</sup> The maxim, "omnia præsumuntur ritè esse acta," will be considered in its place; and it will

<sup>1</sup> Huberus, Præl. Jur. Civ. lib. 22, tit. 3. N. 17; Id. Positiones Juris sec. Pand. lib. 22, tit. 3, N. 24; Menochius de Præs. lib. 1, quæst. 29, N. 3; Id. de Arbitrar. Jud. lib. 2, cas. 472, N. 2; Mascardus de Prob. Concl. 1231, NN. 20 & 23.

that the prisoner had been insane since March 30. The keeper of a lunatic asylum was also sworn, who testified that he had no doubt of the prisoner's insanity at the time of trial, but there was no proof that he was insane at *the time when the crime was committed*, and the jury having, after a long deliberation, found the respondent guilty, he was sentenced to death, and was hanged. While there was no positive evidence in this case that the respondent was insane at the *very moment* when the crime was committed, yet it would seem that the jury would have been justified in finding, from the fact that he was insane before and after the commission of the crime, that the diseased state of mind existed at the *time* when the act was done. But such proof, supported by very slight circumstances, existing at the time when the act was done, tending to show a continuance of the mental disease, may be regarded as sufficient to overcome the presumption of sanity. In any event, such a state of things would furnish just reasons for executive clemency, and Alderson, B., in commenting upon this case, in *Regina v. Oxford*, says: "Bowler was executed, I believe; and it was very barbarous."

In *Lord Ferrer's Case*, 19 How. St. Tr. 886, the respondent was found guilty by the House of Peers, although a large number of witnesses were produced who swore that they believed him insane, and it was proven that several of his ancestors had been tainted with insanity. The rule adopted in that case was, that it was not necessary, in order to render a man responsible for his acts, to show that he was in the complete possession of his reason; that it was sufficient if it appeared that he was *at the time capable of discriminating between right and wrong*.

In determining the question of sanity, the conduct of the prisoner before and after the commission of the crime furnishes the best evidence upon which to base a correct judgment, and it is always competent, when temporary insanity is set up as a defense, to show that the prisoner has previously been insane, or that insanity has existed in his ancestors; and, although this evidence of itself, as a matter of law, is not regarded as sufficient to overcome the presumption of sanity, yet, sustained by slight circumstances, it has often been regarded by juries as sufficient. *State v. Windsor*, 5 Harr. (Del.) 572; *Baxter v. Abbott*, 7 Gray (Mass.), 71.

only be necessary, at present, to advert to some cases in which this presumption has been held to override others also of a favored kind, as, for instance, that of inno-

In *Rex v. Offord*, 5 Car. & Payne, 168, the prisoner was indicted for the murder of one Chisnall by shooting him with a gun. The defense set up was insanity. It appeared that the prisoner labored under a notion that the inhabitants of Hadleigh, and particularly the murdered man, were continually issuing warrants against him with the intent to deprive him of his liberty and life. That he would frequently, under the same notion, abuse persons whom he met in the street, and with whom he never had any acquaintance or dealings whatever. In his pocket a paper was found, headed, "List of Hadleigh conspirators against my life." It contained a list of some forty or fifty names, and among them the name of the deceased and his family. There was also found, among his papers, an old summons about a note, at the foot of which he had written, "This is the beginning of an attempt upon my life." Several medical witnesses swore that, from what they had heard, they believed that the prisoner was a *monomaniac*, and that he committed the offense while laboring under that disorder, and might not be aware that, in firing his gun, it involved the crime of murder.

Lord Lyndhurst, C. B., charged the jury that they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. That the question for them to determine was, *did he know that he was committing an offense against the laws of God and nature*. He also referred to the charge of the court in Billingham's Case, *Collision on Lunacy*, 630, and adopted its doctrine, that when one sought to excuse himself from the penalties of an act upon the ground of insanity, he must show beyond a *reasonable* doubt that, *at the time* he committed the act, he did not consider that murder was a crime against the laws of God and nature. The respondent was acquitted. The rule announced in this case has been quite extensively adopted, but the tendency of courts now is toward a rule much more humane, and consistent with the enlightenment of the age in which we live. The later and better class of cases seem to hold that it is only incumbent upon a party setting up insanity as a defense against a criminal charge to fairly satisfy the jury that, at the time when the act was committed, he was laboring under such a degree of insanity as to destroy his moral accountability. This need not be done by such proof as leaves no *reasonable* doubt upon the question, but by such proof as fairly satisfies a jury that such a mental condition existed in the prisoner. It is not essential that insanity should be proved beyond a reasonable doubt, but when the evidence upon that point leaves the jury with the impression that there is a fair preponderance of proof against the sanity of the prisoner, and they "*most think*" that he was insane *at the time* when the act charged against him was committed,

cence. On an indictment for the murder of a constable, the fact of the deceased having publicly acted as constable is sufficient *prima facie* proof of his having

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or if they have a reasonable doubt as to his sanity, that they should acquit, and so *vice versa*. Indeed, I think that this is the fair and legitimate doctrine of many of the later cases.

In *State v. Sewell*, 3 Jones (N. C.), 245, where the respondent was indicted for murder, and set up insanity resulting from *delirium tremens* in defense, the court left it for the jury to find whether, at the time when the act was committed, he was under the influence of the delirium to such an extent as satisfied them that he was not aware of the nature and consequences of his acts. The burden of establishing the requisite mental alienation to excuse a crime is upon the person setting it up, but it is enough if the proof is of such a character as creates a reasonable doubt in the minds of the jury upon the question of the prisoner's sanity, at the time when the act was committed, and if so, it is their duty to acquit. *Graham v. Com.*, 16 B. Monr. (Ky.) 587; *People v. McCann*, 16 N. Y. 58; *Com. v. Rogers*, 7 Metc. (Mass.) 500; *Lilly v. Waggoner*, 27 Ill. 397; *Snow v. Benton*, 28 id. 306; *People v. Cole*, 7 Abb. (N. S.) Pr. N. Y. 321; *People v. McFarland*, 8 id. 57; *State v. Klinger*, 43 Mo. 127; *People v. Farrell*, 31 Cal. 576; *McAllister v. State*, 17 Ala. 434; *Com. v. Eddy*, 7 Gray (Mass.), 583. In *Hopp v. The People*, 31 Ill. 385, the court held that the respondent, setting up insanity as a defense, need not establish it by a preponderance of evidence, but that, if there was a reasonable doubt of his sanity, the jury must acquit. *People v. Robinson*, 1 Parker's Cr. Rep. (N. Y.) 649; *State v. Starling*, 6 Jones (N. C.), 366; *Walters v. The People*, 32 N. Y. 147; *Smith v. Com.*, 1 Duvall (Ky.), 224; *State v. Spencer*, 1 N. J. 196; *Leffner v. State*, 10 Ohio St. 598; *Fisher v. The People*, 28 Ill. 283; *McKenzie v. State*, 42 Ga. 334; *State v. Fetter*, 32 Iowa, 49; *People v. Montgomery*, 13 Abb. (N. S.) Pr. N. Y. 207; *Dove v. State*, 3 Heisk. (Tenn.) 348; *Bonfanti v. State*, 2 Minn. 123; *Stevens v. State*, 31 Ind. 485; *State v. Lawrence*, 57 Me. 574; *Bradley v. State*, 31 Ind. 492. But a mere doubt is not sufficient. There must be a *reasonable* doubt of the prisoner's sanity. By a *reasonable* doubt is meant that fair, rational difficulty that the mind experiences when it has no settled or definite conviction as to where the truth of a matter lies, and which baffles all attempts to reach a satisfactory conclusion. *Com. v. Cary*, 2 Brewster (Penn.), 404; *Boswell v. Com.*, 20 Gratt. (Va.) 860; *State v. Huting*, 21 Mo. 464; *State v. Cluer*, 5 Nev. 132; *Kriel v. Com.*, 5 Bush (Ky.), 302.

That this rule is reasonable, and adapted to the enlightenment and christianity of the age, is apparent. The presumption of sanity is a mere presumption, and not conclusive, and there can be no good reason given why, when from the proof a fair doubt is raised as to the correctness of the presumption, the prisoner should not have the benefit of the doubt, particularly when his life depends upon the verdict. In *Chase v. The People*, 40 Ill. 352, the court held that, while the prosecution are not bound to establish the prisoner's sanity in

\*been such, without producing his appointment.<sup>1</sup> And on an indictment for perjury in [\* 448] taking a false oath before a surrogate, it is sufficient,

<sup>1</sup> *R. v. Gordon*, 1 Leach, C. L. 515.

the first instance, yet, if the proof subsequently raises a doubt as to his sanity, he is to have the benefit of that doubt. And why not? In order to convict of a crime, the proof must satisfy the jury beyond a reasonable doubt that the respondent is guilty. It is true that on the one hand the law presumes the prisoner sane; so on the other does it presume him to be innocent until he is *proved* to be guilty. Now, when insanity is set up as a defense, and the proof is such as to raise a doubt of his sanity in the minds of the jury, why is he not entitled to the full benefit of that doubt as well as upon any other point? *People v. Cole*, *ante*; *People v. McFarland*, *ante*; *People v. McCann*, *ante*; *State v. Klinger*, *ante*.

The fact that insanity results from dissipation, or any other misconduct of the prisoner, is of no account. The simple question is, whether, at the time when the act was committed, the respondent was laboring under such a degree of mental alienation as not to be aware of the nature or consequences of his act, or as to be morally responsible therefor. If so, the *cause* of his insanity cannot deprive him of the benefit of the defense. *United States v. Glue*, 1 Curtis (U. S. C. C.), 1; *Real v. The People*, 42 N. Y. 270; *Com. v. French*, Thacher's Cr. Cases, 163; *State v. Dillahun*, 3 Harr. (Del.) 551; *People v. Kleim*, 1 Edmonds' Sel. Ca. (N. Y.) 13; *People v. Devine*, *id.* 594; *People v. Hobson*, 17 Cal. 424; *Fonts v. State*, 4 Greene (Iowa), 500. This doctrine is well sustained and illustrated in *Bliss v. R. R. Co.*, 24 Vt. 424; *State v. Windsor*, 5 Harr. (Del.) 512; *People v. Coffman*, 24 Cal. 230; *Hopps v. The People*, 31 Ill. 385; *Bovand v. State*, 30 Miss. 600; *Muconnchay v. State*, 5 Ohio St. 77; *People v. Sprague*, 2 Parker's Cr. Rep. (N. Y.) 43; *United States v. Shultz*, 6 McLean (U. S.), 121; *Com. v. Mosler*, 4 Barr. (Penn.) 264; *Willis v. The People*, 32 N. Y. 715; *State v. Brandon*, 8 Jones (N. C.), 463; *Bradley v. State*, 31 Ind. 492; *Smith v. Com.*, 1 Duvall (Ky.), 224; *State v. Spencer*, 1 N. J. 196. But mere intoxication is never a defense against an indictment for a crime. *People v. Robinson*, 1 Parker's Cr. Rep. (N. Y.) 649; *United States v. Glue*, 1 Curtis (U. S.), 1. Yet, when it so far affects the mind as to overcome the presumption of preconceived malice or intention, it may be operative to reduce the *character* of the crime. *Kriel v. Com.*, 5 Bush (Ky.), 352; *Roberts v. People*, 19 Mich. 401; *Real v. The People*, 42 N. Y. 270; *People v. Williams*, 43 Cal. 344. But *contra*, see *Friery v. The People*, 2 Keyes (N. Y.), 424; *Com. v. Hart*, 2 Brewster (Penn.), 546.

The question as to whether the prisoner was in a mental condition to distinguish between right and wrong is to be confined to the particular offense with which he is charged, although general evidence is admissible as bearing upon the question. *People v. Kleim*, *ante*; *People v. Cole*, *ante*; *State v Shipper*, 10 Minn. 223.

prima facie, to prove that the party administering the oath acted as surrogate,<sup>1</sup> &c.

*Rule 4. The presumption of innocence is favored in law.*

§ 334. IV. *The presumption of innocence is favored in law.*<sup>2</sup> This is a well-known rule, and runs through the whole criminal law; but it likewise holds in civil proceedings. In *R. v. The Inhabitants of Twynning*,<sup>3</sup> which is certainly one of the leading authorities on the subject of conflicting presumptions, it appeared, by a case sent up from the sessions, that about seven years before that time, a female pauper intermarried with Richard Winter, with whom she lived a few months, when he enlisted as a soldier, went abroad on foreign service, and was never afterward heard of. In little more than twelve months after his departure she married Francis Burns. On this evidence the Court of Queen's Bench, consisting of Bayley and Best, JJ., held that the issue of the second marriage ought to be presumed legitimate; and the former judge observes, pp. 388-9: "This is a case of conflicting

<sup>1</sup> *R. v. Verelst*, 3 Camp. 432.

<sup>2</sup> Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 17; Id. Positiones Juris sec. Pand. lib. 22, tit. 3, N. 24; Menochius de Præs. lib. 1, quæst. 29, N. 11; Id. de Arbitr. Jud. lib. 2, cas. 472, N. 25; Mascard. de Prob. Concl. 1231, NN. 9, 30, &c.; *R. v. The Inhabitants of Twynning*, 2 B. & Ald. 386; *Middleton v. Barned*, 4 Exch. 241.

<sup>3</sup> 2 B. & Ald. 386.

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*Uncontrollable frenzy* does not amount to a legal excuse for a crime done under its influence, *unless it be the frenzy of madness and mental alienation*, which, for the time being, renders him mentally unconscious of the nature and consequences of his acts. *The People v. Cole*, 7 Abb. (N. S.) Pr. N. Y. 321; *The People v. McFarland*, 8 id. 517.

Where it is shown that the prisoner was sane just before and just after the crime was committed, the presumption is that he was sane when the act was committed. *Com. v. Lynch*, 3 Pittsb. (Penn.) 12; *Hadfield's Case*, 27 How. St. Tr. 316.



presumptions, and the question is, which is to prevail? The law presumes the continuation of life, but it also presumes against the commission of crimes, and that even in civil cases, until the contrary be proved. \* \* \* The facts of this case are, that there is a marriage of the pauper with Francis Burns, which is *prima facie* valid; but the year before that took place, she was the wife of \*Richard Winter, and if he was alive at the time of the second marriage, it was illegal, and [\* 449] she was guilty of bigamy. But are we to presume that Winter was then alive? If the pauper had been indicted for bigamy, it would clearly not be sufficient. In that case Winter must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved; but the answer is, that the presumption of law is, that he was not alive when the consequence of his being so is, that another person has committed a criminal act. I think, therefore, that the sessions decided right in holding the second marriage to have been valid, unless proof had been given that the first husband was alive at the time." This language goes much farther than was necessary for the decision of the actual case before the court, and certainly cannot be supported to its full extent, as appears from the subsequent case of *R. v. The Inhabitants of Harborne*.<sup>1</sup> There, in order to support an order for the removal of a female pauper of the name of Ann Smith, it was proved that on the 11th of April, 1831, she had been married to one Henry Smith, who had since deserted her; in answer to which it was shown that he had been previously married in October, 1821, to another female, with whom he lived until 1825, when he left

<sup>1</sup> 2 A. & E. 540.

her; that several letters had since been received from her from Van Dieman's Land, one of which was produced, bearing date twenty-five days previous to the second marriage. The sessions, on this evidence, presumed the first wife to be living at the time of the second marriage, and quashed the order. On the case coming on for argument before the Court of Queen's Bench, several cases were cited, and *R. v. Twynning* was relied on as an authority to show that the party asserting the life of the first wife, and thereby the criminality of the husband, was bound to show the continuance of the [\* 450] \*life up to the very moment of the second marriage; and that the court was precluded from inferring the life's continuance until the marriage, by the strict rule of legal presumption laid down in that case. The court, however, consisting of Lord Denman, C. J., Littledale and Williams, JJ., held that the conclusion drawn by the sessions from the evidence was proper. Lord Denman, in the course of his judgment, expresses himself as follows: "The only circumstance, raising any doubt in my mind, is the doctrine laid down by Bayley, J., in *R. v. Twynning*. But in that case, the sessions found that the plaintiff was dead; and this court merely decided that the case raised no presumption upon which the finding of the sessions could be disturbed. The two learned judges, Bayley, J., and Best, J., certainly appear to have decided the case upon more general grounds; the principle, however, on which they seem to have proceeded, was not necessary to that decision. I must take this opportunity of saying, that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact without reference to accom-

panying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. \* \* \* I am aware that Bayley, J., founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it. It may be said, suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Judgments to a similar effect were given by the other members of the court. There is no conflict whatever between the \*decisions in the cases of *R. v. The Inhabitants of Twynning*, and *R. v. The Inhabitants of Harborne*, nor does the principle involved in either of them present any real difficulty. The presumption of innocence is a præsumptio juris, and as such good until disproved. *R. v. Twynning* decides that the presumption of fact of the continuance of life, derived from the first husband's having been shown to be alive about a year previous to the second marriage, ought not to outweigh the former presumption in the estimation of the sessions or a jury; while *R. v. Harborne* determines, that if the period be reduced from twelve months to twenty-five days it would be otherwise, and that the sessions or a jury might, in their discretion, presume the first husband to be still living. This view of these cases is confirmed by the judgment of the House of Lords, in the subsequent case of *Lapsley v. Grierson*.<sup>1</sup>

<sup>1</sup> Ho. Lo. Cas. 498.



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